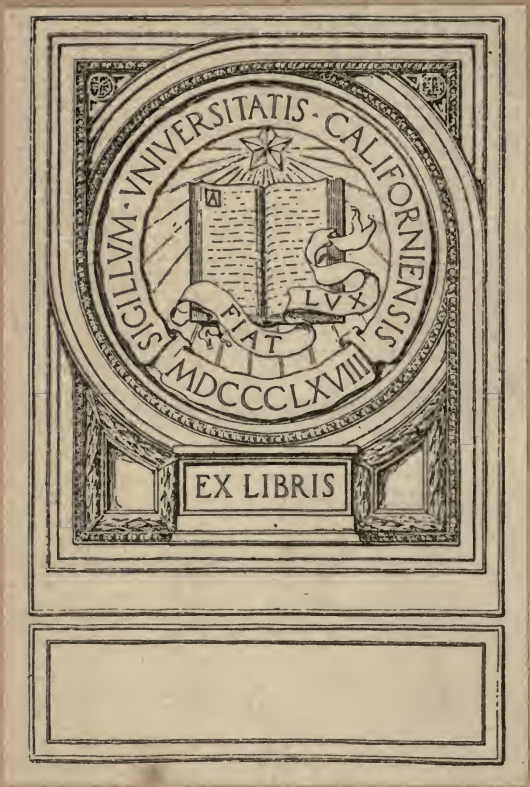
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DANIEL WEBSTER AS A JURIST.

AN

ADDRESS

TO THE

STUDENTS IN THE LAW SCHOOL

OF THE

UNIVERSITY AT CAMBRIDGE.

By JOEL PARKER, LL. D.,
ROYALL PROFESSOR.

"Vera pro gratis."

SECOND EDITION.

CAMBRIDGE:
JOHN BARTLETT.
1853.

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METCALF AND COMPANY, PRINTERS TO THE UNIVERSITY.

NOTE.

As some allusion is made in the following Address to the circumstances connected with its delivery, it may be proper to state, that after the death of Mr. Webster the students of the Law School requested the author, at such time as might suit his convenience, to address them on the life and character of Mr. Webster, and he assented, with the understanding that the Address should be delivered in the usual Lecture-room in Dane Hall, instead of an ordinary lecture.

The students subsequently procured a full-length portrait of Mr. Webster, and placed it in the Lecture-room, by the side of portraits of Judge Story and Chief Justice Marshall, and the Address was then delivered.

At their request it is now printed.

ADDRESS.

Gentlemen of the Law School: —

We deviate, to-day, from the ordinary discussions of this place, that we may pay a further tribute to the memory of one who but a short time since held a commanding position in our chosen profession, — one who, if not in such fulness of years as we desired to have witnessed, yet, after the lapse of the ordinary limit of human life, now "sleeps well" in the silent dormitory of the dead.

You have fitly desired to do such honor as you might to him, whom you have rightly regarded as one of those greater luminaries who have "ruled the days" of the law, and whose light is not extinguished by the providence which has removed him beyond the horizon which limits our present vision.

Upon the occasion of his death, you shrouded our edifice in the emblems of that mourning which was

not of mere outward show, but which pervaded your hearts. And you have now placed within the hall of our daily studies a striking portraiture of his personal presence, that his merits as a lawyer may remain in fresh remembrance, not only with us who now occupy its precincts, but with the succeeding generations, which we fondly hope will fill these seats when we shall have followed him whom we now honor to that final judgment which is subject neither to error nor appeal.

In complying with your resolution, requesting me "to address the School upon the Life and Character of Mr. Webster," I propose to confine myself almost exclusively to that portion of them which had its connection with the profession of the Law. The terms of the resolution might open to me a wider range, for Mr. Webster's life presents him as a jurist, a statesman, a diplomatist, an orator; but your committee have well remarked, that "his prominent position as an advocate and a jurist has, perhaps, been somewhat hidden by his later and more conspicuous renown as a statesman," and it is particularly fitting that in these halls we should render to his memory a professional homage.

For his character as a legislator, a statesman, a diplomatist, there are other forums and places of eulogy. From the halls of Congress, from the places specially appointed for funeral obsequies,

and from the pulpit, there have been eloquent tributes to his character and services as a statesman and orator; but brief indeed are the pages which have attempted to portray him as a jurisprudent.

In the legal tribunals, upon the occasion of his death, the loss which the profession and the community had sustained was depicted in words that shadowed forth the deep feeling which pervaded the country, and eloquent lips rendered due homage to his intellectual greatness, and sketched, in general terms, his labors and services in the cause of jurisprudence along with his merits as a statesman, an orator, and a man.

These memorials, brief as they necessarily must be, are usually all that remain to us of the members of the profession, except the abstracts of their arguments scattered through the volumes of the Reports.

But of one so distinguished, we very naturally desire to know something more than can thus be placed upon the record, — something more in detail of his student's life, — of his entrance upon his profession, — his success, — and his rise to that eminence which made his counsel sought, and his services required, from the banks of the Penobscot to the mouth of the Mississippi; and we inquire what was his training, — what his course of argument, — his style, — his peculiar mental characteristics, — his professional deportment.

We desire to study his character, and not to dismiss it with the tribute, however able and eloquent, of the passing hour which tolls his knell.

The duty which I have assumed does not require me to speak, except in general terms, of the events of Mr. Webster's early years. His character as a jurist dates no farther back than his entrance into the office of Mr. Thompson, immediately after his graduation in 1801.

But it may be stated, and it should be stated, as a word of encouragement to the hopes of the student, and to dissipate some of the fears which may beset him, that there seems to have been nothing in Mr. Webster's boyhood essentially differing from that of many other of the young men of the country. The opinion of his mother, "that he would come to something or nothing, she was not sure which," is one which might be entertained of many a young man, who, with a strong love for reading and for poetry and an aptitude for acquisition unites a fondness for fishing and hunting, and perhaps no very strong desire for manual labor. And it is apparent that it was not the development of any precocious intellect, marking the boy as the father of his own mature age, that designated him for an education beyond that proposed to be bestowed upon the rest of the family.

The desire of the father to give his son the advantage of a collegiate education is one which he shared

with thousands of the yeomanry of the country, no better able to sustain the pecuniary burden of it, and the selection seems to have been made rather from a supposition that the constitution of this son was not robust enough for successful labor on a farm, than from any well-defined conviction that he was destined to attain any more than an ordinary elevation in a professional life. The strong wish of his father, at the completion of his legal studies, that he should accept the clerkship of the County Court, and the expression of his belief, that by his son's refusal he was about settling the mother's doubt, certainly does not indicate that his education had been with a sanguine expectation of great and immediate juridical distinction. And this may serve to show also, what seems to be the fair inference from all else which we learn of him at that period, that there was nothing in his collegiate course, however creditable it had been, which gave any undoubted assurance that he would attain an eminence above that of all his fellows. He stood among the foremost of his class, as is, of course, the case with a portion of all classes. This is true of some, I wish I might not say of many, who, after long lives of marked inefficiency, go down to their graves undistinguished by any approach towards a fulfilment of their early promise.

So of the earlier part of Mr. Webster's course of professional study. Mr. Thompson, in whose office

the first part of his novitiate was passed, and who had the character of an able lawyer, very competent to discover and estimate the talents and acquisitions of his pupil, however highly he may have judged of his capacity, had not, so far as I am aware, any anticipation of his future fame. Like other students, he found Coke on Littleton too hard a study for his comprehension at that day. "I was put to study," he said, "in the old way, in the hardest books first, and lost much time. I read Coke on Littleton through without understanding a quarter part of it. A boy with no previous knowledge on such subjects cannot understand Coke. It is folly to set him upon such an author. There are propositions so abstract, and distinctions so nice, and doctrines embracing so many conditions and qualifications, that it requires an effort, not only of a mature mind, but of a mind both strong and mature, to understand him. Why disgust and discourage a boy, by telling him that he must break into his profession through such a wall as this? I really often despaired. I thought I never could make myself a lawyer, and was about going back to the business of school-keeping." He took to reading Espinasse's Nisi Prius, and other, the most plain and intelligible works, which he could understand, and afterwards acknowledged his obligation to Espinasse for helping him out of this difficulty.

It was not until near the close of his studies, preparatory to his admission to the bar, and upon the occasion of his admission, that we have through Mr. Gore some evidence of the promise which was fulfilled in after years, a prediction of his future success, which derived its sure accomplishment from the determination of the subject of it, "that so far as depended on him it should not go entirely unfulfilled."

Prior to this event there had been years of earnest study, and it was this application and diligence, and the result of them as they manifested themselves to Mr. Gore, that led him, sagacious as you know him to have been, to foresee something of the probable future of his esteemed pupil.

Let not the import and design of these remarks be the subject of misconstruction. I have no disposition to deny or to undervalue the native intellectual powers of Mr. Webster, nor to insinuate that his earlier youth did not give all of promise that it should have given; and I certainly do not mean to suggest, that, with a feeble intellectual organization, study could ever have made him what he was. But it is important that the truth should be understood and comprehended, that, however favorable to intellectual greatness might have been his original powers of mind, they had their development with severe training and hard study.

In one of the most able of the many eulogies which have issued from the press,* the author, while he vindicates for Mr. Webster a transcendent intellectual power, says, "It is not necessary to deny, that in particular mental attributes he may have been deficient, either by nature or by practice, in comparison with some others. It may readily be conceded that he displayed less high intuitive perception of truth than Plato, less profound philosophical insight than Coleridge, less imaginative vividness and richness of conception than Burke, less metaphysical acumen than Edwards; and at the same time may be claimed for him, that in native original strength of mind, in what may be called naked intellect, he was equal to any of them." And he adds, "From some latent bias, perhaps, or from outward circumstances, this original intellectual force took in him a practical rather than a speculative direction, moved in the argumentative rather than in the intuitive process, the logical rather than the metaphysical method." The doubt implied in this last sentence you will readily solve, and will be at no loss to what cause to ascribe it, that the intellectual force took such a direction. The study and the practice of the law in which his mind had its principal training, until its mature manhood, are eminently of the practical, and argumentative, and logical.

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* By President Woods of Bowdoin College

The lawyer who should deal largely in the speculative, and intuitive, and metaphysical, would find that his means were not at all adapted to his ends. His science deals with facts to be ascertained, and principles to be investigated and applied. Mr. Webster was not a lawyer by intuition. I never yet heard of any person that was so. There may be, undoubtedly there is, a natural taste for the study of the science of the law, as there is a natural predilection for the study of philosophy, or chemistry, or poetry, painting, and sculpture. That the tendencies of his mind led him to that profession may be assumed, notwithstanding his early love for poetry, which finds small place in legal disquisitions, and the statement that he had an inclination for the study of theology.

But such a tendency of the mind, even with pre-eminent native powers, will not make any one a lawyer.

Mr. Webster was by no means ambitious of the reputation of having accomplished what he performed through the inspiration of his genius; but upon various occasions attributed what success had attended him to persevering labor, and enforced his recommendations of active diligence by a reference to his own practice. And it may be remarked here, that Mr. Webster's taste for his profession, or his study of it, was never extinguished by his other

tastes and pursuits. His mind was never so far withdrawn from the science of the law, as to change its character, or the character of its manifestations.

The occupations of a politician, especially of a party politician, do not necessarily demand a severe logic, nor are they always supposed to require a thorough knowledge of the principles of the law, or an undeviating adherence to any principles; but the politician who aspires to be a successful statesman, under a constitutional government, must adhere to logic and eschew metaphysics. With Mr. Webster, to be a statesman was to be a lawyer still. Much of his fame in that department in which he is most widely known, has been earned by his arguments and speeches upon constitutional law, and so intimately have law and politics been blended with him, that his labors in the latter department must be taken into consideration in forming our estimate of him as a jurist. In order to a correct appreciation of his character at the time of his admission to practice, we should understand that the bar did not then present numerous examples of laborious and persevering study. Fun and frolic ruled the hours of the evening, and in many instances cards held jurisdiction over the midnight hour, and the earlier hours of the morning; no very good preparation for the trial of cases on the day which followed. It must be admitted that the first half of the present century has not been sig-

nalized merely by steamboats and railroads, cotton-gins, and spinning-jennies. It has brought, along with these, marked changes in the habits of the people, some, perhaps, not for their enduring happiness. But of the beneficial influence of those which have been made in the habits and customs of the bench and the bar, there cannot be a difference of opinion. The leading reformer in producing this juridical revolution in New Hampshire was Chief Justice Smith. Mr. Webster early saw and predicted it to a near relative of the speaker; and with a joyous temperament, and a high zest for social pleasure, we have a striking exemplification of the decision of character which marked his future life, in the fact that the instance is not known in which he indulged in any of the dissipations of that time.

At that period the collection of debts formed a much more important branch of the business of the legal practitioner than it does at the present, and, except in the instance of a few leaders, the success of the lawyer was estimated by the number of actions which he entered at each term of the court. Tested by this criterion, the dockets show that Mr. Webster entered immediately upon a very respectable business.

It then required two years' practice before an attorney could be admitted as a counsellor in the Superior Court, and it was rare that younger mem-

bers of the profession ventured the full flight of an argument to the jury in the Common Pleas, until they had fledged their wings by an opening statement or two as junior counsel.

To this practice, as might be expected, Mr. Webster was an exception; but he came within the ordinary rule, that a lawyer commences his professional life with cases the magnitude of which is somewhat in proportion to his professional experience. It may encourage the young practitioner, whose hopes of some great case in which he may distinguish himself are not immediately realized, to reflect that Mr. Webster's first argument was in the humble capacity of counsel before a justice of the peace. The aspirant may not find so distinguished a magistrate as "George Jackman, Esq., who had held a commission from the time of George the Second." But the jurisdiction of the tribunal may be as ample, and the judgment as important to the interests of his client.

According to the ordinary course of the business at the first term of the Court of Common Pleas that he attended as an attorney (September term, 1805), Mr. Webster's first argument before a jury must have been in an action founded upon a tavern bill, amounting to about twenty-four dollars, in which he succeeded in obtaining a verdict for seventeen dollars. He had the good sense not to despise small things.

He appears at the same term to have conducted the defence in an action of assumpsit, in which a verdict for an amount a little larger was rendered against his client.

There is nothing in the nature of the cases to indicate that either of them admitted of any great display of legal talent. It seems, however, that reference is made to one of these, when it is said that "his father lived long enough to hear his first argument in court, and to be gratified with confident predictions of his future success." But there is evidence of his early professional ability, as manifested at the September term, 1806, when his argument made such an impression upon a friend of the speaker,* then a lad of some ten or twelve years, that after the lapse of nearly half a century he distinctly remembers the high encomiums passed upon it. "I recollect," he writes, "with perfect distinctness, the sensation which the speech produced upon the multitude. There was a great throng there, and they were loud in his praise. As soon as the adjournment took place, the lawyers dropped into my father's office, and there the whole bearing of the young man underwent a discussion. It was agreed on all hands that he had made an extraordinary effort, when —— ——, by way of accounting for it, said, 'Ah, Webster has been studying in Boston,

* B. F. French, Esq., of Lowell.

and has got a knack of talking; but let him take it rough and tumble awhile here in the bush, and we shall see whether he will do so much better than other folks.' "

No man ever rose more rapidly to professional distinction by his unaided efforts. It is stated in the Life of Chief Justice Smith, that in 1806, before Mr. Webster had been admitted as a counsellor in the Superior Court (and of course before he was entitled to address the jury), being engaged as attorney in a cause of no great pecuniary importance, but of some interest and some intricacy, he was "allowed to examine the witnesses, and briefly to state his case, both upon the law and the facts. Having done this, he handed his brief to Mr. Wilson, the senior counsel, for the full argument of the matter. But the Chief Justice had noticed him, and on leaving the court-house said to a member of the bar, that he had never before met such a young man as that." *

Most of those who, then in mature life, witnessed his early career as a lawyer, have passed away. But those among his juniors who had the means of observation bear uniform testimony to his immediate success. It was and still is a common occurrence in country practice, that counsel other than the prosecuting officer of the government are employed by the party more immediately aggrieved to originate

* Life of Judge Smith, p. 180.

criminal prosecutions, and to prepare the evidence for the trial. One member of the bar recollects a case of that description in Mr. Webster's early practice, where the preparation of the case insured the conviction of the offender, who, if extraordinary sagacity had not been brought to the aid of justice, would probably have escaped. The merits of the preparation attracted the notice of the Chief Justice, and elicited, along with a strong expression of approbation, confident anticipations of his future success.

Another recalls his argument upon a question of partnership in an adventure to the West Indies, of which men spoke in such terms of commendation as men do not speak of the ordinary arguments in a court of justice; and another believes the removal of Mr. Webster from the County of Hillsborough to the wider and better field of business in the County of Rockingham, at the end of two years from his admission, to have taken place, not merely because his brother had then been admitted to practice, and could well take his office in Boscawen, or because that was his original intention, but for the reason that, having an engagement to argue a cause in the latter county, which then adjoined Hillsborough, he was, at the close of that argument, forthwith retained in nearly all the remaining cases upon the docket standing for trial at that time.

He himself said that there happened to be an

unfilled place among the leading counsel at that bar, and that he succeeded to it, although he did not fill it. Others have no doubt that he filled it; but it seems apparent from their statements, and from his own, that it was through a somewhat severe experience in the outset. The acknowledged leader of the bar in that county then and long after was Jeremiah Mason, and I have only to name him to satisfy most of you, that, whatever might have been Mr. Webster's success thus far, it would hardly have furnished conclusive evidence that he was yet qualified to cope with so formidable an adversary.

Thoroughly versed in the principles and practice of his profession, cool, wary, and persuasive, a sound logician, and of excellent judgment, — devoted to the cause of his client, and willing to avail himself of all technicalities in order to secure his success, — it doubtless required all the science of special pleading which Mr. Webster had acquired in reading and translating Saunders, and all the law which he had derived from other books, to maintain his position.

Some half-dozen years since, in a company of gentlemen, Mr. Webster was applied to for his opinion of Mr. Mason's ability as a lawyer. Speaking deliberately, and in a manner denoting his intention to give emphasis to what he uttered, he replied that he had known, as a young man knows his superiors in age, the bar of a former generation, — all the

leading men in it, — and he was intimately acquainted with all the leading lawyers of the present bar of the United States; but for himself, he had rather meet, if it could be combined, all the talent and learning of the past and present bar of the United States than Jeremiah Mason, single-handed and alone. The man who had Jeremiah Mason for his counsel was sure of having his case tried as well as it was possible for human ingenuity and learning to try it.* Perhaps there were some reminiscences connected with this declaration.

In a beautiful tribute to the character of Mr. Mason, at a bar meeting upon the occasion of his death, Mr. Webster said: "I am bound to say, that of my own professional discipline and attainments, whatever they may be, I owe much to that close attention to the discharge of my duties which I was compelled to pay for nine successive years, from day to day, by Mr. Mason's efforts and arguments at the same bar. *Fas est ab hoste doceri;* and I must have been unintelligent indeed not to have learned something from the constant displays of that power which I had so much occasion to see and to feel."

It would appear, however, that there were "blows to take, as well as blows to give," from the time of the earliest meeting of Mr. Mason and Mr. Webster as opposing counsel. In another note to the Life

* P. Harvey, Esq.

of Chief Justice Smith it is stated, apparently on the authority of Mr. Mason himself, that the first time they met was in a criminal trial. The defendant was indicted for counterfeiting. Mr. Mason was in the defence, and Mr. Webster, in the absence of the Attorney-General, was applied to by the Solicitor for the county to act in behalf of the State. Mr. Mason, it is said, had heard of him as a "young man of remarkable promise"; but he had heard such things of young men before, and prepared himself as he would have done to meet the Attorney-General. But he soon found that he had quite a different person to deal with. The young man came down upon him "like a thunder-shower," and Mr. Mason's client got off, as he thought, more on account of the political feelings of the jury, than from the arguments of the counsel. Mr. Mason was particularly struck with the high, open, and manly ground taken by Mr. Webster, who, instead of availing himself of any technical advantage, or pushing the prisoner hard, confined himself to the main points of law and fact. Mr. Mason did not know how much allowance ought to be made for his being taken so by surprise; but it seemed to him that he had never since known Mr. Webster to show greater legal ability in an argument.*

It may be added, that the defendant in that case

* Life of Judge Smith, p. 263.

had been a member of the Legislature of New Hampshire, and a remark of Mr. Webster, in his argument to the jury, in connection with the statement that the standing of a man did not exempt him from the operation of the law, that "the majesty and impartiality of the law were such that it would bring even its guilty creator to its feet," was adduced to me a few days since, as an instance of his power and felicity of expression even at that day.

I pass over his professional life during his residence in Rockingham. It was one of constant employment. He argued more cases, it is said, than any other member of the bar; but most of them were not of a character to live in history. Instances are related of his sagacity and success there, but a single anecdote must suffice at this time. The case grew out of the common transaction of a conveyance of a farm by a gentleman somewhat advanced in years, with a life-lease or a bond taken back to secure the payment of an annual sum, or rent, for the support of the old gentleman. The sum was duly paid for two or three years, and a receipt of the amount indorsed upon the instrument, and signed by the holder. Next came a failure to pay, and to an application for payment the answer was, that the whole matter was settled, and discharged, the last year. Upon an examination of the instrument, it was found

that the last indorsement, instead of being for the annual payment, purported to be a full discharge.

There was great sympathy for the party thus defrauded, and Mr. Webster was engaged, and an action was commenced, in the hope that the fraud might be shown. Before the trial, however, it was understood that the defendant did not rely upon the written discharge alone, but that he had a witness to prove the fact of the settlement.

The case looked very hopeless unless something should be discovered; but it proceeded to trial. After it was opened, a friend of the plaintiff stated to Mr. Webster, that there was a person sitting back of the bar, who appeared to be very busy studying a paper which was in his hat. He noted him, and soon after saw him take the stand as *the* witness. He related, in a plausible story, how he was present and heard the terms of the settlement; but Mr. Webster observed that the language of his testimony was somewhat in legal form, — "the *said*" plaintiff, "the *said*" defendant, &c., — and saw the corner of a paper which was in his vest pocket. When it came to the cross-examination, Mr. Webster rose, and, reaching over the table, snatched the paper from his pocket, with the stern inquiry, "Where did you get that, Sir?" It proved to be the story drawn up for the witness to relate, and it was apparent that it came from the defendant. The

fraud was made clear, and the action forthwith settled. Men took him for a magician.*

Some years since, "Mr. Webster, in speaking of the practice of the law in Boston, when he first went there, compared with that in New Hampshire, said he had practised law, commencing before old Justice Jackman in Boscawen, who received his commission from George the Second, all the way up to the court of John Marshall, in Washington, and he had never found any place where the law was administered with so much precision and exactness as in the County of Rockingham." Special pleading had not then been shorn of its honors by brief statements and informal answers.

His removal to Massachusetts took place in 1816, and shortly after his settlement in Boston he was employed in the defence of the Kennistons, indicted for the robbery of Goodridge. Such an account of that trial as can be had at the present day, is found in his Works. I am informed by the junior counsel,† that he maintained the defence quite as much by his dexterity in eliciting the truth on the cross-examination of the witnesses, as by his argument.

A full practice followed very soon after he established himself in Boston.

Among his cases in the State courts, the case of

* Professor Greenleaf.

† Hon. S. W. Marston.

the Knapps stands out in bold relief, and is probably familiar to most, if not all, of you.

We must pass over his practice in the State, and turn back some few years, to his entrance into the Supreme Court of the United States.

His election as a member of Congress from New Hampshire, in 1813, led him into that court.

His first appearance there, as chronicled in the Reports, was at February term, 1814.

In 1815 he argued, as senior counsel, The Town of Pawlet *vs.* Clarke. The case involved questions respecting the jurisdiction of the Court of the United States, the construction of the grant of the township by the Provincial Governor of New Hampshire, and the principles of law applicable to one of the shares, declared to be for a glebe for the Church of England; — whether there was a party competent to take this share, under the grant, and the operation of the statutes of Vermont upon cases of that class.

In February, 1817, after his removal to Boston, he seems to have commenced his regular attendance in that court, but the cases at that time were of no great value as contributions to jurisprudence, and while they were sufficient to make him known as belonging to the profession, had no material in them to establish a reputation.

In the succeeding year he appeared as counsel for Bevans, indicted for murder on board the United

States ship Independence, lying in the harbor of Boston; Bevans being a marine and posted as a sentry at the time, and Leinstrum, the deceased, being cook's mate on board the same ship. Questions were reserved whether the offence was committed within the jurisdiction of the State of Massachusetts, or any court thereof, and whether it was within the jurisdiction of the Circuit Court of the United States, and after a verdict against the prisoner, these questions were certified to the Supreme Court for determination. In this case Mr. Webster made a very elaborate argument, involving the consideration of the law of nations relating to ports, the rules of the common law, the jurisdiction in admiralty, and the provisions of the English statutes upon the subject, with the construction of the Constitution and the statutes of the United States respecting the jurisdiction of the Federal courts. This argument might well have given him a character as a lawyer, but from the limited practical results involved in the case, and from subsequent efforts exhibiting greater power and embracing questions of wider interest, it seems to have been lost sight of.

At the same term he argued, with Mr. Hopkinson as his senior counsel, the celebrated case of Dartmouth College, which, from its important bearing upon the rights of corporations, as well as from the signal ability which he displayed in discussing it, has become so widely known.

It is supposed by many to have been his first appearance in the court, and some entertain the belief that he was before unknown at Washington, and that the court was taken by surprise. But a reference to the Biographical Memoir prefixed to his Works, will show that the surprise was on the occasion of his maiden speech in the House of Representatives, in June, 1813, upon certain resolutions of inquiry which he had moved relative to the repeal of the Berlin and Milan decrees. "It was marked by all the characteristics of Mr. Webster's maturest parliamentary efforts, — moderation of tone, precision of statement, force of reasoning, absence of ambitious rhetoric and high-flown language, occasional bursts of true eloquence, and pervading the whole a genuine and fervid patriotism."* Chief Justice Marshall, writing to Mr. Justice Story, some time after, says, "At the time when this speech was delivered, I did not know Mr. Webster, but I was so much struck with it, that I did not hesitate then to state, that Mr. Webster was a very able man, and would become one of the first statesmen in America, and perhaps the very first." The argument in the case of the Dartmouth College is generally referred to as establishing his fame as a lawyer, and sometimes as if the leading principle of the case — namely, that a grant of cor-

* Memoir by Hon. Edward Everett, Webster's Works, Vol. I. p. xxxviii.

porate powers is a contract, within the meaning of the clause of the Constitution of the United States prohibiting the States to pass laws impairing the obligation of contracts — had its origin with him, and was first heard of in the argument of the case at Washington.

On the other hand, it has been said, in a pamphlet purporting to be a sermon, that "it is easy to see that the facts, the law, the precedents, the ideas, and the conclusions of that argument had almost all of them been presented by Messrs. Mason and Smith in the previous trial of the case."

That case may well be regarded as extending, perhaps as establishing, his fame as an able and eloquent advocate. It was an argument of great power, evincing an intimate knowledge of his subject, a familiarity with the authorities relating to the power of the crown in respect of corporations, — a branch of legal learning which was doubtless at that day much less familiar to the profession in general than it is at present. It contained also an elaborate exposition of the clause in the Constitution of the United States prohibiting the States from passing laws impairing the obligation of contracts, and doubtless had great weight in leading to a construction which gave a broader scope to that clause than most jurists had before supposed it to possess.

All this was enforced by a calm, clear logic, and

at times by pathos and eloquence such as are rarely witnessed in the arguments of mere legal questions.* There can be no doubt of the great merit of the argument, and any admiration of it as a clear, logical, cogent application of legal principles to the facts of the case, can hardly be deemed excessive.

It may be doubted, however, whether, upon examination, it would be found to be wise, or even just to others, that the whole credit of the successful defence, in that case, should be ascribed to him. President Brown, although not a lawyer, was a very learned man. In the Board of Trustees there were several distinguished men; among them were Judge Paine and Mr. Marsh of Vermont, Judge Farrar and Mr. Thompson of New Hampshire. Judge Smith and Mr. Mason were of counsel, and twice argued the case in the State court, — Mr. Webster being present the last time, and making the closing argument as the senior counsel. The point upon which the case finally turned in the Supreme Court was argued by both of them, but not so exclusively as before the Supreme Court, because in the State court other questions were considered, which Mr. Webster regretted were not open for discussion in the tribunal of last resort. It is hardly probable, under these circumstances, that the credit of the

* Mr. Ticknor, in the American Review. See Webster's Works, Vol. I. p. li.

defence, even upon the point upon which it prevailed, should belong exclusively to any individual. However early in the case Mr. Webster may have been of counsel, I am not aware that there is any evidence to show that he originated the idea that the charter was a contract protected by the Constitution of the United States. It was used by the other counsel who argued before him as a part of the common stock of the defence, and if they never claimed a sole property in it, I am not aware that they ever disclaimed any right to it, as they would probably have done if conscious that it belonged exclusively to one for whom they both entertained so high a regard.

But that he was not entitled to his full share — to the lion's part even — of the credit belonging to that defence, has been suggested nowhere, I think, except in the quarter to which I have referred. If proof were required to show that he was not repeating the other counsel, it might be found in the declaration made by one of them to the other, as they were leaving the court-room, after the last argument in the State court. "There, it is as I told you it would be, that Webster would show himself a head taller than either of us." And in a contemporaneous article in the Salem Gazette, which, as it assumes to give the distinctive features of the arguments on the part of the plaintiff, may be of sufficient interest to be repeated, it is said: "Mr. Mason

opened the cause on Friday morning, and, in a speech of about two hours, presented to the court a most clear, comprehensive, and masterly argument, distinguished for great force and acuteness of reasoning, and for the beauty of its illustrations. He was followed by Judge Smith, who spoke about four hours, and brought forth all the learning of the books to enforce the principles laid down by his colleague, and produced a very elaborate, ingenious, and interesting argument, enlivened by much classic point, and delicate wit and humor. On Saturday morning Messrs. Bartlett and Sullivan took up about three hours in behalf of the University" (the defendant), "and displayed much ability and ingenuity. Mr. Webster replied to them with great force and effect, in a speech of little more than an hour. Though upon a mere question of law, and strictly confining himself to the subject, yet by the genius and eloquence — eloquence of soul, of sublime sentiment and feeling — with which he presented his views of the cause, he swelled the hearts and filled the eyes of many who listened to him with delight."

Whether his argument in the case of Dartmouth College led to his engagement in the case of McCulloch *vs.* The State of Maryland, which was argued at the next term, and stands in the reports before the other, the opinion having been pronounced earlier, I am unable to say. It embraced questions of great

magnitude respecting the United States Bank, — its constitutionality, its right to establish branches in the several States, and the right of the States to tax those branches. He was associated with Mr. Wirt, the Attorney-General of the United States, and Mr. Pinkney; and opposed to Mr. Hopkinson, Mr. Jones, and Mr. Luther Martin, the Attorney-General of the State. A note informs us that, "this case involving a constitutional question of great public importance, and the sovereign rights of the United States and the State of Maryland, and the government of the United States having directed their Attorney-General to appear for the plaintiff in error, the court dispensed with its general rule permitting only two counsel to argue for each party." * All were heard, and it certainly was a distinguished post to be even junior counsel in such a case, and in such company.

If I were obliged, however, to rely upon any one argument in a court of justice on which to rest Mr. Webster's reputation as a distinguished constitutional lawyer, it would be that in Gibbons *vs.* Ogden, decided in 1824.†

Most of you are aware that this case grew out of the grants of the State of New York, first to Fitch and subsequently to Fulton, of certain exclusive rights to navigate the waters of that State with fire

* 4 Wheaton's Reports, 322.

† 9 Wheaton's Reports, 1.

and steam as the motive power, and acts to secure the benefit of those grants to Fulton and his assignees. The assertion of the exclusive right gave rise to great excitement, and to counter legislation on the part of the States of New Jersey and Connecticut. Ogden was interested under the grant. Gibbons, having obtained a coasting license for certain steamboats belonging to him, asserted a right under that license to navigate the waters of the Sound from New Jersey to New York, and Ogden filed a bill in the Court of Chancery in New York for the purpose of obtaining an injunction to restrain him. The defence was placed upon two grounds: 1. That the grants of the exclusive privileges by the State of New York were void so far as they attempted to restrain navigation authorized by the Constitution and laws of the United States, and that the defendant, having a license to employ his vessel in the coasting trade, had a right to pass from point to point, notwithstanding the grant and the restraining acts; and, 2. A license from Ogden himself. The latter was not sustained. Chancellor Kent evidently considered that there was weight in the first objection, although he was not convinced that the case was clear enough for him to decide against the grant. The closing paragraph of his opinion upon this point is remarkable, not merely as implying some doubt of the right of the State to make the

grant, but for the felicitous manner in which he concludes his opinion, that nothing but the judgment of the superior tribunal of that government which had the power to regulate commerce, would warrant a decision adverse to the State legislation. "If," said he,* "the State laws were not absolutely void from the beginning, they require a greater power than a simple coasting license to disarm them. We must be permitted to require the presence and clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon those laws, in direct collision and conflict, before we can retire from the support and defence of them. We must be satisfied that,

> '*Neptunus muros, magnoque emota tridenti,*
> *Fundamenta quatit.*' "

The case was carried to the Court of Errors, and, what is again somewhat remarkable, the judgment of that court affirming the decree of the Chancellor was unanimous.† The defendant removed the case to the Supreme Court of the United States by a writ of error, and Mr. Wirt and Mr. Webster were engaged as counsel.

It is not, I think, generally known, but it is stated that, "when they met for a consultation respecting the case at the time of the hearing, Mr.

* 4 Johnson's Chancery Reports, 159.
† 17 Johnson's Reports, 488.

Wirt, who was senior counsel, asked Mr. Webster what position he proposed to take, and that he then gave him his views of the case, and the ground to be taken. Mr. Wirt, in answer, said that he did not think the case could be made to stand upon his positions, and that he thought a certain other view, which he gave, was the true line of argument. To this Mr. Webster as fully and frankly dissented, as Mr. Wirt had just before done to his positions. It was thereupon agreed that each should go into the court upon his own views of the case." * There is, in the argument as reported, evidence to sustain this account of the consultation. Mr. Wirt urged, as the main point in his argument, that the legislation of New York was in conflict with the provisions of the Constitution of the United States giving to Congress the power to promote the progress of science and the useful arts. Mr. Webster did not rely upon this, nor mainly upon the coasting license under the act of Congress, but assumed the broader ground, that the grant of power to regulate commerce was exclusive in the United States; that commerce was a *unit*, and that the grants and statutes of New York on the subject were regulations of commerce, and thus directly in conflict with the Constitution.

* For this anecdote I am indebted to Judge Crosby of Lowell. The authority is Peter Harvey, Esq.

The remarks of Judge Wayne, in an address to Mr. Webster upon the occasion of his visiting Savannah in 1847, give him the credit of originating and sustaining this construction. Speaking of the position that a coasting license gave a right to navigate, he said, "It was a sound view of the law, but not broad enough for the occasion. It is not unlikely that the case would have been decided upon it, if you had not insisted that it should be put upon the broader constitutional ground of commerce and navigation."

And in his reply, Mr. Webster said, "It is true that, in the case of Gibbons *vs.* Ogden, I declined to argue this cause on any other ground than that of the great commercial question presented by it, — the then novel question of the constitutional authority of Congress *exclusively* to regulate commerce in all its forms, on all the navigable waters of the United States, their bays, rivers, and harbors, without any monopoly, restraint, or interference created by State legislation." *

This construction of the Constitution, so important in its result, was, so far as I am aware, first suggested upon that argument.

It is further said, on the authority before referred to, that, "Mr. Webster having stated his positions to the court, Judge Marshall laid down his pen, turned

* Works, Vol. II. p. 402.

up his coat-cuffs, dropped back upon his chair, and looked sharply upon him; that Mr. Webster continued to state his propositions in varied terms, until he saw his eyes sparkle and his doubts giving way; that he then gave full scope to his argument, and that he never felt the occasion of putting forth his powers as when he was arguing a question before Judge Marshall. Mr. Wirt followed, but Judge Marshall gave much of Mr. Webster's language and argument in his decision, with no more than a reference to Mr. Wirt's."

Although the decision was finally made upon the right of the defendant under his coasting license, and the invalidity of the grants of exclusive rights as against the constitutional provision and the statutes under which the license was granted, the opinion of the Chief Justice follows and sustains very distinctly the argument of Mr. Webster upon the construction of the Constitution, the invalidity of the prohibitory laws of New York as regulations of commerce, and the right of the defendant to navigate the waters of New York independent of the license.

The case of the appellant being sustained under the constitutional provision respecting commerce, it did not become necessary to examine that in relation to science and the arts, and the Chief Justice so stated.

It would extend this sketch beyond its prescribed

limits, were I to give even brief notices of the most important cases in which he was subsequently engaged as counsel.

The reports of Mr. Webster's legal arguments are in most instances mere skeletons of the body, into which he breathed the breath of life and made it a warm and vigorous creation; while his orations, and many of his speeches, of which notes were taken at the time with a view to an extended report, are published in the words, or very nearly the words, which came from his lips.

But the arguments will endure, and the student of the law will resort to them, not only for their value as expositions of legal principles, but to some extent as precedents by which to fashion his own course of reasoning.

The divine will cite his arguments and his speeches, as well as his orations, for the support which they give to good order, morality, and religion. All his efforts as a jurist claim that commendation. In this respect, however, he was not an exception to the rule. Whatever may be private dereliction, followed by private repentance, to the credit of the bar be it said, that the instance is exceedingly rare, if it be known, in which any member of the profession, while in the course of the public duties of it, does not recognize the overruling providence of the Deity, and the duty, founded upon His law, of justice and

equity between man and man. If he may be required, at times, to insist that the rules of the law applicable to the case before the court furnish for human tribunals the equity and justice which must govern that case, and that all beyond must be left to the personal conscience of the parties; the conscientious lawyer, in a state of facts which tend to impeach the justice of the dealings of his client, does not attempt to shield him by a weakening of the bonds of moral obligation or an undermining of religious faith.

But in the frequency of his recognition of moral duties and religious obligation, in the course of his forensic employment, he stands preëminent, and the beauty and energy of that support have given it a value beyond the occasions in which it was elicited.

Reference is often made to his description, upon the trial of Knapp, of the constant presence to the mind of a sense of duty, — of the cheering influence of duty performed, and the haunting recollection of duty neglected.

His remarks to the Ladies of Richmond inculcate with great force the sentiment, that moral obligations attend all our actions: — "I have already expressed the opinion, which all allow to be correct, that our security for the duration of the free institutions which bless our country depends upon habits of virtue and the prevalence of knowledge and of education. The

attainment of knowledge does not comprise all which is contained in the larger term of education. The feelings are to be disciplined; the passions are to be restrained; true and worthy motives are to be inspired; a profound religious feeling is to be instilled, and pure morality inculcated, under all circumstances. All this is comprised in education. Mothers who are faithful to this great duty will tell their children, that neither in political nor in any other concerns of life can man ever withdraw himself from the perpetual obligations of conscience and of duty; that in every act, whether public or private, he incurs a just responsibility; and that in no condition is he warranted in trifling with important rights and obligations. They will impress upon their children the truth, that the exercise of the elective franchise is a social duty, of as solemn a nature as man can be called to perform; that a man may not innocently trifle with his vote; that every free elector is a trustee, as well for others as himself; and that every man and every measure he supports has an important bearing on the interests of others, as well as on his own. It is in the inculcation of high and pure morals such as these, that in a free republic woman performs her sacred duty and fulfils her destiny." *

His argument in the case of Girard's will, against

* Works, Vol. II. p. 107.

any system of education which excludes religion as its basis, will stand as a testimonial in favor of Christianity quite as convincing as the most eloquent sermon. "Christianity," said he, "is part of the law of the land. Every thing declares it. The massive cathedral of the Catholic; the Episcopalian church, with its lofty spire pointing heavenward; the plain temple of the Quaker; the log church of the hardy pioneer of the wilderness; the mementos and memorials around and about us; the consecrated graveyards, their tombstones and epitaphs, their silent vaults, their mouldering contents; all attest it. *The dead prove it as well as the living.* The generations that are gone before speak to it, and pronounce it from the tomb. We feel it. All, all proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and the fagot are unknown, general, tolerant Christianity, is the law of the land." *

The scholar will resort to those of his works of which finished reports exist, to acquire a more clear and lucid mode of statement and of deduction. They are models of a strong, nervous, direct, and elevated style, altogether exempt from bombast or bathos, inflation or turgidity, as well as from feebleness, and uncertainty, and involution.

* Works, Vol. VI. p. 176.

And the orator will moreover seek in them for examples of eloquence, and felicity of classical allusion and illustration.

The student should make himself familiar, not alone with his legal arguments, but with his orations and speeches, for the value of the rhetoric; for the eloquence of statement, as well as of the sentiments. He should study the graphic manner in which he presents before his auditor and his reader the events and scenes which he describes, and feel how completely his words must have identified his hearer with himself.

We are with him at the celebration of the landing of the Pilgrims: — "*We* have presented before us the principal features and the leading characters in the original scene. *We* cast our eyes abroad on the ocean, and we see where the little bark, with the interesting group upon its deck, made its slow progress to the shore. We look around us and behold the hills and promontories where the anxious eyes of our fathers first saw the places of habitation and of rest. We feel the cold which benumbed, and listen to the winds which pierced them. Beneath us is the rock on which New England received the feet of the Pilgrims. We seem even to behold them as they struggle with the elements, and with toilsome efforts gain the shore. We listen to the chiefs in council, we see the unexampled exhibition of female fortitude

and resignation, we hear the whisperings of youthful impatience, and we see what a painter of our own has also represented by his pencil; chilled and shivering childhood, houseless but for a mother's arms, couchless but for a mother's breast, till our own blood almost freezes." *

We stand by his side at the laying of the corner-stone of the Monument on Bunker Hill: —"*We* come, as Americans, to mark a spot which must for ever be dear to us and our posterity." And we unite in the wishes which he expresses as the organ of the association for its erection: — "*We* wish that whosoever, in all coming time, shall turn his eye thither, may behold that the place is not undistinguished where the first great battle of the Revolution was fought. We wish that this structure may proclaim the magnitude and importance of that event to every class and every age. We wish that infancy may learn the purpose of its erection from maternal lips, and that weary and withered age may behold it, and be solaced by the recollections which it suggests. We wish that labor may look up here and be proud in the midst of its toil. We wish that in those days of disaster, which, as they come upon all nations, must be expected to come upon us also, desponding patriotism may turn its eyes hitherward, and be assured that the foundations of our national

* Works, Vol. I. p. 8.

power are still strong. We wish that this column, rising towards heaven among the pointed spires of so many temples dedicated to God, may contribute also to produce, in all minds, a pious feeling of dependence and gratitude. We wish, finally, that the last object to the sight of him who leaves his native shore, and the first to gladden his who revisits it, may be something which shall remind him of the liberty and the glory of his country." And we exclaim with the orator, "Let it rise! let it rise, till it meet the sun in his coming; let the earliest light of the morning gild it, and parting day linger and play on its summit." *

In the power of clothing his conceptions in appropriate costume, and presenting them in beautiful imagery, he stands among the most distinguished. Witness his reference to the testimony of the agonized father of Knapp: — "He thinks, or seems to think, that his son came in at about five minutes past ten. He fancies that he remembers his conversation; he thinks he spoke of bolting the door; he thinks he asked the time of night; he seems to remember his then going to bed. Alas! these are but the swimming fancies of an agitated and distressed mind. Alas! they are but the dreams of hope, its uncertain light, flickering on the thick darkness of parental distress." †

* Works, Vol. I. p. 62.

† Ibid., Vol. VI. p. 84.

Witness his tribute to the services of Hamilton: — "He was made Secretary of the Treasury; and how he fulfilled the duties of such a place, at such a time, the whole country perceived with delight, and the whole world saw with admiration. He smote the rock of the national resources, and abundant streams of revenue gushed forth. He touched the dead corpse of the public credit, and it sprang upon its feet. The fabled birth of Minerva from the brain of Jove was hardly more sudden or more perfect, than the financial system of the United States, as it burst forth from the conceptions of Alexander Hamilton." *

Witness his description of the power and influence attached to the name of Washington, and his statement of the importance of the political example of the United States: —

"We are met to testify our regard for him whose name is intimately blended with whatever belongs most essentially to the prosperity, the liberty, the free institutions, and the renown of our country. That name was of power to rally a nation, in the hour of thick-thronging public disasters and calamities; that name shone, amid the storm of war, a beacon light, to cheer and guide the country's friends; it flamed, too, like a meteor, to repel her foes. That name, in the days of peace, was a loadstone, attract-

* Works, Vol. I. p. 200.

ing to itself a whole people's confidence, a whole people's love, and the whole world's respect. That name, descending with all time, spreading over the whole earth, and uttered in all the languages belonging to the tribes and races of men, will for ever be pronounced with affectionate gratitude by every one in whose breast there shall arise an aspiration for human rights and human liberty."

"Gentlemen, the spirit of human liberty and of free government, nurtured and grown into strength and beauty in America, has stretched its course into the midst of the nations. Like an emanation from heaven it has gone forth, and it will not return void. It must change, it is fast changing, the face of the earth. Our great, our high duty, is to show, in our own example, that this spirit is a spirit of health as well as a spirit of power; that its benignity is as great as its strength; that its efficiency to secure individual rights, social relations, and moral order, is equal to the irresistible force with which it prostrates principalities and powers. The world at this moment is regarding us with a willing, but something of a fearful admiration. Its deep and awful anxiety is to learn whether free states may be stable, as well as free; whether popular power may be trusted, as well as feared, in short, whether wise, regular, and virtuous self-government is a vision for the contemplation of theorists, or a truth established, illustrated,

and brought into practice in the country of Washington.

"Gentlemen, for the earth which we inhabit, and the whole circle of the sun, for all the unborn races of mankind, we seem to hold in our hands, for their weal or woe, the fate of this experiment. If we fail, who shall venture the repetition? If our example shall prove to be one, not of encouragement, but of terror, not fit to be imitated, but fit only to be shunned, where else shall the world look for free models? If this great *Western Sun* be struck out of the firmament, at what other fountain shall the lamp of liberty hereafter be lighted? What other orb shall emit a ray to glimmer, even, on the darkness of the world?" *

As an example of his felicity of classical quotation and illustration, I shall refer you to but a single instance, — the close of his argument in the case of Dartmouth College. The case had been heard in the highest court of the State, and judgment there was against the plaintiff. From that judgment there was no appeal, and no escape, but by a writ of error to the Supreme Court of the United States, and that upon the position that the acts of the Legislature were in conflict with the Constitution. The reasons for this position had been arrayed and urged upon the attention of the court with great cogency, but

* Works, Vol. I. pp. 219, 224.

the advocate, as a last appeal, commends them to the consideration of the court of last resort because it is such. "*Omnia alia perfugia bonorum, subsidia, consilia, auxilia, jura ceciderunt. Quem enim alium apellem? quem obtester? quem implorem. Nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quæ spe exigua extremaque pendet, tenuerimus, nihil est præterea quo confugere possimus.*" *

But his most distinguishing characteristics, whether as a jurist, a legislator, an orator, or a writer, were his full comprehension of his subject, and the perspicuity and strength with which he presented his views of it.

His conceptions were clear and vivid, and his comprehension great.

In his ability to keep his whole case present to his mind and to follow out his train of reasoning, constantly keeping the end distinctly in view, and steadily approaching it, making each portion of his argument in due order successively subservient to the purpose to be accomplished, he is not exceeded, I think, by any.

Although his imagination was in full proportion with his other faculties, it rarely led him into any digression which diverted the attention of his hearer from the main object, and from which he must return

* 4 Wheaton's Reports, 600; Works, Vol. V. p. 501.

to resume his discourse again at the point of divergence.

If compelled to digress by any extraneous circumstances, he was at no loss respecting the place of departure, nor for the means of regaining the course in which he was proceeding.

The strength and force with which he presented his subject were in proportion and in harmony with his grasp of it. Great powers of analysis, or generalization, or condensation, as the occasion might require, were called into action at will.

His statement of his case was so perspicuous, that it has been said, in some instances, that when the statement was made, the case was argued.

His illustrations were appropriate, never causing the hearers to wonder how they happened to be introduced, or what relation they could bear to the subject.

The logic of his argument was transparent. His hearers understood him without effort, unless the effort were required from the abstruse character of the subject. On a subject of interest to them, their attention was enchained, and they were carried along with him; but there was no sense of weariness from efforts to comprehend the course and the effect of the reasoning.

In the argument of a question of fact to a jury, he sought to convince them by a classification and

sifting of the testimony, by an ascertainment of a state of facts favorable to his client, by arranging them in connection with the principles of the law in such a perspicuous statement and course of reasoning as would carry the hearer by a series of deductions which must be admitted, because shown, step by step, to the final result. And so far as conviction was to be carried to the mind, and a favorable result attained by such a process, he stood certainly among the eminent, if not preëminent.

To success in such a course of argument, it is necessary, not only that the speaker should have in the outset the whole case and all its bearings in his mind, and that all this should remain present to him, so that he can perceive, not only the immediate effect and operation of each proposition which he endeavors to maintain, but the remote bearing even of all the remarks he may make; otherwise, by the attempt to maintain an untenable position, he gives an opportunity to his adversary to demolish one of his chain of posts, causing the fall of those in connection with it and dependent upon it.

Even an incautious, an unadvised remark, may give occasion for a reply, the effect of which is felt much beyond the mere success of controverting the statement contained in it.

There was in Mr. Webster's arguments no wavering as to the course to be pursued, no hesitation

which topic to select next, leading to the adoption of one, and then the abandonment of that and the substitution of another.

His discourse proceeded like the regular flow of a mighty current, generally smooth and placid, as well as powerful, swelling perhaps with greater force if pent within narrower limits, and giving some note of the presence of any obstruction which impedes its course, expanding itself for a moment, fertilizing its banks and giving life to beautiful flowers, but following on, in its regular channel, to its ultimate destination.

That his arguments were admirably adapted to command the assent and compel the belief of his hearers, in a good cause, you need not be told. He almost persuades us that the conscience of the murderer is constantly urging him to confession, and that his perilous secret cannot be retained, — the exception instead of the rule, — and it will readily be believed that his auditors, in a case of such painful interest, should become so excited and absorbed by his course of argument as to experience a sense of physical oppression.

"I heard," writes a friend,* "Mr. Webster's great argument in the trial of Knapp. I sat near him, in full view of his person, where I could watch every motion and emotion, all the rolling and flashing of

* Judge Crosby, of Lowell.

the eye, and the changing expression of his beautiful, yet awful face. I never before, nor have I since, felt human power — power of mind and circumstance — equal to it or like it. His voice, his logic, his glowing descriptions, beautiful and terrific by turns, his language, his eloquence, with the ever-varying shades of his countenance, took perfect possession of all my powers and sensibilities. I was carried at his will, and absorbed and lost under his power. When he passed from one topic and branch of his argument to another, I would awake to conscious lassitude and weariness, — a sinking of every muscle in my body, — a sudden relief from high mental and nervous excitement; — it was relief for a moment only, for I was soon again following him towards another point of conviction of the inevitable doom of the offender. The court was a high and honorable, and then awful tribunal, — the criminal was young and gentlemanly, and surrounded by reputable friends, — the bar was filled with lawyers, and the court-house densely crowded with anxious citizens. I doubt whether Mr. Webster was evermore excited, more impressive, or victorious."

From the fact that the people thronged wherever he was to speak, and that he was listened to with such intense interest, it has been supposed that "neither judge nor jury could often withstand his power

of eloquence," and that it "gave him a success as an advocate at the bar which in this country is without a parallel"; and it might perhaps be inferred from the qualities which I have ascribed to him, that he carried away his auditors at pleasure, and moulded them to his purpose.

But it will hardly excite surprise, after a moment's reflection, when I add that his success with courts and juries was very much dependent upon the goodness of his case, and with politicians according to their previous political opinions.

Your own deductions will readily lead to the conclusion, that when the statement is clear, the defect in the case, if one exist, may be the more apparent; and Mr. Webster met his case fairly. He resorted to no tricks to make the worse appear the better reason. He did not exhibit the same power when his argument was merely the presentation of the case of his client, and his own convictions of the merits of the case did not give life and energy to it. It was said upon the occasion of his decease, by a distinguished counsellor who had been accustomed to practise by his side, that "he could not argue a bad cause comparatively well."* And in the later period of his life the remark was occasionally heard, that "it required a great case to rouse him to the exertion of his powers." We may not overlook the im-

* C. G. Loring, Esq.

port of these words. The student of the law should understand that the most thorough acquisition of the general principles of the science, will not insure the due application of his knowledge to any but the plainest case, without time for reflection, a careful consideration of the facts, and of the bearing of his principles upon them, and a concentration of his energies upon the matter before him. Besides, a limited observation teaches us that it is given to no individual at the present day, in any part of the country where the law is duly administered, to sway the verdicts and judgments of juries and courts at the pleasure of his will.

The success of an orator and an advocate in bringing his auditory to adopt his conclusions is dependent somewhat upon their intelligence and freedom from bias, as well as upon his ability.

If they have in the outset strong opinions of their own, they are not readily reasoned out of them. This is especially true of political opinions, with which, however, we have little to do upon the present occasion.

If they have not the capacity to comprehend the bearing of the discourse, or its reasoning, his hearers will be influenced in their opinions and conclusions mainly by their preconceived notions respecting the speaker, or the subject-matter, or the parties, or possibly by extraneous and accidental circum-

stances. If they have that degree of information which enables them to comprehend what is set directly before their minds, and to admire without reflection or the exercise of judgment, a skilful speaker, having the power of enchaining the attention by a smooth diction, a persuasive style of address, and a deferential manner, and trained to note the impression which he produces, will carry more votes, and command more verdicts, than one who relies upon the force of his logic, and the ability with which he can present the facts of the case. If to these qualities be added a facility of invective, or denunciation of whoever stands in opposition, the orator who addresses himself to these semi-intelligent auditors may be nearly resistless.

It is for such reasons that, in the defence of capital cases, the selection of jurors is generally made with a view to their impressibility, their humanity, and their want of capacity to estimate the force of a connected chain of reasoning. And we often hear of the success of advocates, not from their great legal attainments, or the superiority of their powers of reasoning, but from various other causes; from their ability to follow out a popular course of argument, from a persuasive style of discourse, putting the hearer on good terms with the advocate and himself, from great professions of candor and fairness, and from powers of wit and ridicule.

Among the names of note in England as popular advocates, Erskine perhaps stands preëminent. Sergeant Cockle was quite celebrated; and it is said to have been a common verdict with the jury, "We find for Sergeant Bond, and costs."

If in this country the intelligence of the jurors has given a better shape and form to their verdicts, we have almost within our own time evidence of the remarkable success with which lawyers of popular talents have procured them for their clients, especially in criminal cases.

Mr. Benjamin West, of New Hampshire, was a marked instance of this. And of Mr. Grundy, of Tennessee, it is related, that of numerous capital cases he never lost one, or but one. Mr. Clay's success also is well known.

Let me not be understood as insinuating that the distinguished gentlemen whom I have just named resorted to any of the unworthy arts of the advocate. Far from it. They were undoubtedly great men. But their extraordinary success was due, I think, to the popular character of their talents, and to the degree of education among the jurors of that time. Mr. Webster's greatness was of a different character; and no similar success is to be expected at the present day.

The face of things is all changed. Jurors do not come to their duty from a retirement and seclusion

fitted to make them the subjects of a persuasive oratory. The school has extended its operations. The newspaper and periodical press scatter their sheets broadcast over the land. The increase of population and the course of business have changed the isolated households, each of which provided to a great extent for its own wants by its home manufactures, into communities where each family is more directly dependent upon others for the supply of its daily wants. Trade and intercourse enlarge the conceptions and reflections of a people, and thus serve as a practical education, enabling them the better to comprehend the relations of things.

For these reasons, as well as because his talents were not of a popular order, and because the final charge from the bench is more generally understood to furnish reliable principles of law for the guidance of the jury in the particular case, it was impossible that Mr. Webster should attain to that measure of mere success which has distinguished some others; and if there were no direct evidence respecting the fact, we should not be prepared to admit the statements, that "you felt before he opened his lips that all your arguments were giving way, — that it was all over with you, — a foregone conclusion, — that you had nothing to offer why sentence should not even then be pronounced; you stood hopeless and helpless, — resigned yourself at discretion to be

borne along on the calm but irresistible flow of words whithersoever he would"; that he possessed "a power of eloquence which in the maturity of after life neither judge nor jury could often withstand"; and that he had "a success as an advocate at the bar, which in this country is without a parallel."

There is, if not exaggeration itself, at least a tendency to exaggeration in all enthusiasm. We gain no very definite idea of the dignity of Mr. Webster's appearance, by being told that "he was gazed at as something more than mortal, and having appeared as Moses might when emerging from the smoke of Sinai, his face all radiant with the breath of divinity."

We shall not the better comprehend the magnitude and extent of his powers by exhausting upon them all the superlatives which the vocabulary can furnish.

We shall form a false estimate of his early manhood, if we understand literally the statement, that "before the meridian of his life, he had come to stand, in respect to thorough and various legal learning, at the very head of the American bar, and was widely known through the country as the great lawyer before he was known in any other character." Whether the age of thirty-six be regarded as before or after the meridian of life will depend upon the points which we assume for its commencement and termi-

nation. If we regard it as beginning at the age of majority, it will remove the meridian somewhat from its natural position. It was at the age just mentioned that he argued the case of Dartmouth College, before which, certainly, his professional fame could not have been greatly extended beyond the limits of New England. But years previous to that he had become widely known as a member of the House of Representatives by numerous speeches which attested his ability, and the first of which, as we have seen, gave rise to a prediction by Chief Justice Marshall of his future greatness as a statesman. At that period there was a bright constellation within the bar of the Supreme Court of the United States, — Harper, Martin, Jones, Hopkinson, Ogden, and others.

Mr. Wirt's title to be regarded as a most eminent lawyer was not dependent upon his position as Attorney-General, and it might deserve a question whether it must not have required more than one or two arguments, however learned and brilliant, to place any one, at that period, in advance of him in the public estimation.

At that time, also, Mr. Pinkney was in the zenith of his fame. He died February 25th, 1822. In a memorandum prefixed to the volume of the Reports for that year, introductory to the proceedings of the Court and Bar with reference to that event, it is

said: "For many years he was the acknowledged leader at the head of the bar of his native State, and during the last ten years of his life, the principal period of his attendance in this court, he enjoyed the reputation of having been rarely equalled, and perhaps never excelled, in eloquence and the power of reasoning upon legal subjects." *

Up to that time, it may be said, Mr. Pinkney was the "defender of the Constitution." In the same memorandum we find, after a high tribute to his learning and arguments: "But it is as an enlightened defender of the national Constitution against the attacks which have been made upon it, under the pretext of asserting the claims of State sovereignty, that his loss is most to be lamented by the public. It is known to his friends, that he was a short time before his death engaged in the investigations preparatory to making a great effort in the Senate upon this interesting subject."

And in this connection it may be noted that Mr. Pinkney, in the closing argument in McCulloch *vs.* Maryland, sets forth in strong terms the proposition that the Constitution of the United States was not a federative league, but was derived from powers communicated directly by the people; — which is the basis of the great constitutional argument in the replies of Mr. Webster to Mr. Hayne and Mr. Cal-

* 7 Wheaton's Reports, xv.

houn. Speaking of the question, whether the act of Congress establishing the bank was consistent with the Constitution, he said: "No topics to illustrate it could be drawn from the Confederation; since the present Constitution was as different from that as light from darkness. The former was a mere federative league; an alliance offensive and defensive between the States, such as there had been many examples of in the history of the world. It had no power of coercion but by arms. Its radical vice, and that which the new Constitution was intended to reform, was legislation upon sovereign states in their corporate capacity. But the Constitution acts directly *on* the people, by means of powers communicated directly *from* the people. No State in its corporate capacity ratified it, but it was proposed for adoption to popular conventions. It springs from the people, precisely as the State constitutions spring from the people, and acts on them in a similar manner. It was adopted by them in the geographical sections into which the country was divided. The federal powers are just as sovereign as those of the States."* It was this argument concerning which Judge Story wrote to a friend: "I never in my whole life heard a greater speech. It was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was over-

* 4 Wheaton's Reports, 377.

whelming. His language, his style, his figures, his arguments, were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty, he brushed away as with a mighty besom." *

There is doubtless quite as strong a tendency to exaggeration in a partisan opposition as there is in an enthusiastic approbation. I need not pause to cite examples.

But it has been objected to Mr. Webster, that he originated nothing; that is, that his efforts were to sustain the present, rather than provide new rules for the future. It may be true that the tone of his mind was in general conservative, — that he was of opinion that the government we possessed was sufficient for us, if its resources were developed and it was well administered. Except his efforts for the extension of the blessings of civil liberty, he did not stand foremost in the ranks of the reformer.

But the objection, if it be one, has less weight when applied to his character as a jurist than it might have to him as a statesman. A jurist eager to signalize himself by great and immediate radical reforms may be a very dangerous and mischievous animal. I hardly need to say to you, that I am by

* Story's Life and Letters, Vol. I. p. 325.

no means unfriendly to reform. But the abolition of one system of law and the introduction of a new and untried code cannot but cause great disturbance and uncertainty. It is partly for this reason that conquest does not of itself impose the laws of the conqueror upon the vanquished country. What would be the effect, in any State, of a statute which should abrogate the common law, and introduce the French code "so far as it could be adapted to a republican form of government," need not require an argument. The rules of law which regulate the relations of life are so interwoven, that a great change cannot be effected in one part without corresponding changes in others, or a disturbance in the harmony of the system.

Besides, the actual duty required of the jurist in Mr. Webster's day was rather that of construction and adaptation, than that of striking out new and untried theories.

It has not been objected to the elder Parsons, that, after aiding in the formation of the Constitution, instead of devising and introducing a new code of laws for the government of Massachusetts, he performed the perhaps greater, and certainly more beneficial labor, of applying the principles of the common law to the new state of things which had arisen in the country, and adjusting the several parts of the new system so as to form a harmonious whole in the

new relations of the several parts; — a work which was far from being completed when he took his seat upon the bench, and of which he, at the bar and on the bench, performed, at least, his full share.

The term "*learned*" is sometimes used as if it were applicable only to one who had read many books. In one of its uses it undoubtedly bears that construction. Thus it has been said, "Men of much reading are greatly learned, but may be little knowing." In this sense Mr. Webster was not a learned lawyer. The circumstances attending his early professional education did not admit of a deep and thorough study of the jurisprudence of Continental Europe, however much that might have aided him as a practising lawyer in the courts of common law (a problem not yet perhaps satisfactorily solved). And there is, I think, no evidence in any of his arguments, that at a later period he attempted to acquire a little smattering of German jurisprudence, or picked up an occasional excerpt from the *proces verbal* of some French tribunal, with the idea of thereby appearing to be wise beyond his day and generation.

It may be true, that he was not a diligent reader of the books of the law from the period when his labors as a statesman became very arduous and engrossing.

It is clear that he did not make himself an ill-

digested index of well and ill considered propositions and adjudications, using them sometimes luckily, and sometimes unluckily, as it might happen.

He did not need the learning, even of good cases, to the same extent as many others; and investigations of that character could be made for him by junior counsel, as the occasion required.

But so far as deep and earnest study of the principles of the science of the law, in their application to the affairs of government and of men, according to the system in the administration of which he bore his part, and a comprehensive knowledge of those principles, may be understood to make a learned lawyer, he is entitled to that distinction.

In these particulars, I think, he closely resembled Chief Justice Marshall, for whom he had a great regard. That he had great fondness for political life, and was therein dissimilar, is undoubtedly true.

I have it from reliable authority,* that at one time President Jackson was desirous of showing that he appreciated the support that his administration had received from Mr. Webster's Senatorial labors; and that the venerable Chief Justice was not averse to a resignation which should leave his mantle to fall upon him. But the suggestion met with no favor. The scope of the duties was too limited for his taste at that day.

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* Hon. J. Mason.

The school of practice in which Mr. Webster's early professional life was passed, in New Hampshire, was one which inculcated great fidelity to the interests of the client, rather than great courtesy towards the opposing counsel. It is somewhat difficult, in the earnest exertions of the forum, to keep, at all times, such watch and ward over the amenities of our intercourse with those around us, as may easily be prescribed within the limits of the social circle; and I should probably not command your ready assent, should I present Mr. Webster to you as the *beau ideal* of professional courtesy. While from any thing I have observed, I should not be warranted in saying that he was at any time overbearing, I must admit the existence at times of a somewhat unceremonious manner. There are few counsellors holding a leading position, who do not exhibit, in the course of their professional lives, more or less of this. And in this connection I may repeat to you, that I have never witnessed professional civility of a higher or more uniform character than that exhibited by the gentleman who now fills the office of President of the United States, and by a learned brother, for years his opposing counsel at the bar, who has since adorned the bench of the Superior Court of New Hampshire. If with Mr. Webster there may at times have been some abruptness of expression, rendered more marked by the volume of his voice, I

have yet to learn any instance in which it degenerated into discreditable personal altercation.

Almost uniformly, his manner was that of courtesy to his opponents, and with rare exceptions, I think, that of respectful deference to the court.

The principal characteristics in his manner of speaking were dignity and earnestness; occasionally a manifestation of playfulness. It was rarely, however, that he sported with his subject, his object being to produce conviction rather than amusement or wonder. But he was by no means indifferent to the impression he might make upon those who were voluntary listeners, and held no portion of the power of decision.

He possessed great readiness in reply. He had great self-possession and self-reliance, but it was not the reliance of pretension. It was founded on tried and conscious power and ability to sustain himself. He had a most perfect command of his faculties. In the eulogy to which I have more than once alluded, there is an anecdote connected with some remarks upon his reply to Mr. Calhoun, in 1833, which furnishes a very remarkable illustration of his intellectual power and self-possession. "That high mastery," it is said, "over the subject, that fund of reserved power, with which he always impressed his hearers, was strikingly exhibited during the delivery of his speech, by a little incident which I happened to wit-

ness from standing in the crowd near the orator. At a moment when his argument seemed to demand his undivided attention, and when the powers of the assembly were most severely taxed in following him, and all were hanging on his lips, a package of letters was laid on his desk by a page of the Senate. Without at all arresting the course of his argumentation, except perhaps by a slight abatement of the fluency of his utterance, he opened his letters and cast his eye over them so as apparently to possess himself of their chief contents, by a perfectly contemporaneous process of thought; and thus gave demonstration that, great as was the occasion and the subject, he had mind enough for them *and to spare.*"

Assuming it to be true that the letters were not merely looked at, but that their contents were comprehended, it may be regarded perhaps as a proof of the duality of the mind. And it may well raise our admiration of the powers of him we now commemorate, to be assured that it required but the one half of his brain through which to carry on the process of reflection and argumentation necessary for that great constitutional argument, and that the other half could be at the same time absorbed in other, and perhaps entirely different, processes of thought, changing from moment to moment as successive and dissimilar subjects passed under review.

While his style has not the exuberant richness of that of Story, on the other hand, it is not limited to the severe simplicity which made effective the massive arguments of Dexter, nor to the terse energy which was conspicuous in the speeches of Calhoun. Nor did his arguments, like those of Pinkney, abound with gems "brilliant and sparkling."

Reared in the school of the common law, and in a part of the country where, as a distinct jurisdiction, a court of equity was unknown, — made familiar with nice technical distinctions, not only by his studies in the offices of Thompson and Gore, but by his practice by the side of Mason, and under the jurisdiction of Smith, — it may well be supposed that he had not studied the Roman law with the assiduity of Kent, and was not so much inclined to the infusion of a broad equity into our system of jurisprudence.

His most enduring fame as a jurist will rest more especially in the department of constitutional law, and there his appropriate position is precisely where you have placed him, — with Marshall and Story, — the defender of the Constitution by the side of its expounder and its commentator, — the latter occupying the central point, as the *genius loci.*

He derives his title to that position from his many constitutional arguments and speeches, and from his having been of the same school of constitutional law. Two of them on the bench, and one of these

in the lecture-room, and the third at the bar, in the halls of legislation, and in the primary assemblages of multitudes, have done more than any other three individuals to settle the construction of the Constitution. It was no small part of the labor of construction to adjust the new system to the existing systems with which it was connected, and upon which it was founded.

It is not to be denied that the doctrines of that school have already been the subject of modification, and that this process is not entirely completed.

But so long as the Constitution shall exist, and so long as any record of its history shall remain, wise men will do honor to the wisdom and firmness of those who framed and adopted it, and to the signal ability of its *expounder*, its *commentator*, and its *defender*.

The True Issue, and the Duty of the Whigs.

AN

ADDRESS

BEFORE

THE CITIZENS OF CAMBRIDGE,

OCTOBER 1, 1856.

BY

JOEL PARKER.

CAMBRIDGE:
JAMES MUNROE AND COMPANY
1856.

Some portions of this Address were necessarily omitted in the delivery, and the speaker for that reason remarked that he should have to follow the precedents in Congress, and ask leave to publish his speech. The response, to say nothing of subsequent requests, may be allowed to justify the publication of it entire. The Constitutional argument may perhaps be of some value.

CAMBRIDGE:
ALLEN AND FARNHAM, PRINTERS.

ADDRESS.

MR. PRESIDENT AND FELLOW-CITIZENS: —

YOUR kind greeting encourages the belief that you will permit me to say a few words in the first person singular. The effect of what I may say at this time, supposing it to have any effect, may depend very much upon the character in which I appear before you. But, for another and a different reason, let it be distinctly understood, that I do not, upon this occasion, represent the sentiments of any department of Harvard College, and am not here as the Royall Professor. Upon some of the topics upon which I may speak, it would have given me pleasure to have held a free conversation with my associates in the Law School, but I sedulously avoided it in order to make this disclaimer, and have no reason to suppose that they concur in my opinions, except a belief that the doctrine is sound, and that they, therefore, as wise men, must approve of it.

I come before you, then, as a citizen of Cambridge, a constitutional lawyer, if you please, and especially as a Whig; as one who has been a Whig since the formation of the Whig party;—withdrawn in a measure from ordinary political contests, but known as a Whig.

It was said in 1852 that an eminent member of the Whig party prophesied that there would be no Whig party after the presidential election that year. Certain it is, that many of the friends of that great statesman did what they could to accomplish such a result by voting for the present occupant of the presidential chair. I was not "left" to do that, but supported, in good faith, the Whig candidate. When the citizens of Cambridge, in 1853, elected me a delegate to the Constitutional Convention, it was as a Whig. And at the last gubernational election, while approving to some extent the efforts of the American party, sympathizing with some of the principles of the Freesoil party, and honoring Governor Gardner for measures of his administration, which others of his friends disapproved, it did not appear expedient to separate myself from a party which still clung to existence, and I formed one of the forlorn hope which voted for the Whig nominee.

The result of that election showed very clearly that the party, as an effective party, no longer had any existence, and left to its members the inquiry,—With what party and in what connection shall a Whig hereafter endeavor to perform the duty which a good citizen owes to his country?

The Fugitive Slave Law of 1850 could not have had my vote, because there is no provision in it securing a trial to the fugitive on his rendition and return, and there are obnoxious sections which serve only to exasperate the citizens of the non-slave-holding States, and seem almost designed for the purpose of insult. But believing it to be, however unwise, a constitutional enactment, in my public teachings and private discourse, I have maintained the constitutionality of that law, and stopped a religious newspaper, conducted with great ability, on account of my disapproval of the encourage-

ment it gave to a forcible resistance to the execution of that law.

I may claim, therefore, to be a Whig, a Massachusetts Whig, a Conservative Whig, a National Whig; perhaps as sound an expositor of Whig principles as if I were a member of the Whig State Central Committee itself.

The events which have occurred within a recent period, have rendered the inquiry, " in what connection shall a whig hereafter endeavor to perform the duty which a good citizen owes to his country," one of exceeding interest. Notwithstanding the opposition to the Compromise Measures, as they were called, of 1850, the country was settling down to a quiet acquiescence, when in 1854 came the repeal of the Missouri Compromise Act of 1820. Some of you must well recollect the circumstances which occurred in 1819 and 1820, connected with the admission of Missouri into the Union; — the stern and determined opposition to its admission, unless coupled with a restriction of slavery within its limits. You doubtless recall the joy with which you hailed vote after vote in the House of Representatives, seeming almost to insure the triumph of freedom; and the revulsion of feeling, almost dismay, with which you learned, at last, that Missouri had been admitted without restriction, upon a compromise by which slavery was thereafter to be excluded from all territory north of 36° 30′ north latitude.

This compromise was eminently a Southern measure, carried as such measures always are, by the aid of a few Northern votes; and it was treated for the time in the slave-holding States as something more sacred than ordinary legislative enactments;—as a kind of semi-constitutional law, securing all south of 36° 30′ to slavery. A proposition to repeal it would have been a crime second only to

treason. But when, after the third of a century, the time came for the enjoyment of the equivalent supposed to be secured to the non-slave-holding States, it was all at once discovered that the compromise part was not only a mere legislative act, but that it was unconstitutional legislation. Then the doctrine arose, that slavery could not be excluded by Congress from the territories; and slavery having secured the benefit, rejected the burden attached to it, by a repeal of the restriction. Until very recently I had supposed that this repeal was a project of Mr. Douglas to secure the favor of the slave-holding States, and that the President was drawn in to its support, by the fear that Douglas would take the wind out of his sails in the approaching presidential boat-race; but a friend has just furnished me a copy of a New York paper containing what appears to be an authentic statement, derived from a gentleman who has spent several years in Western Missouri, showing that Douglas is not entitled to the credit, if credit it may be called, of originating the nefarious plot. His was only a secondary agency in wickedness. It seems that the Ahabs of Western Missouri have long coveted the fertile vineyard of Kansas as an addition to their slave-holding possessions, and that they determined to possess themselves of it after the manner of their great prototype, peaceably, if they could, forcibly, if they must.

Permit me to read an extract: —

"The slavery party in Missouri, under the lead of David R. Atchison, have long had their eyes upon the Kansas Territory, and were resolved upon the most desperate expedients to carry slavery there whenever it should be opened for settlement. Having no idea that it would ever be possible to procure the abrogation of the Missouri Compromise restriction, their plan was to keep every thing quiet as possible, until they could have every thing ready,

procure a territorial charter, slip over a sufficient number of their own men to elect a territorial legislature, and as soon as possible form a State government and get admitted to the Union, and before the people of the free States should suspect what was going on, establish slavery by an act of the new State legislature. In the latter part of 1853, almost a year before the passage of the Nebraska Bill, a public meeting was held in Platte county, Missouri, to consider the affairs of Kansas. Atchison made a speech, and was the master-spirit of the meeting; and it was

"'*Resolved*, That if the Territory shall be opened to settlement, we pledge ourselves to each other *to extend the institutions of Missouri over the Territory*, at whatever sacrifice of blood or treasure.'

"These resolutions were published in the *Platte Argus*. This was long before Douglas had thought of venturing upon the repeal. The pledge there given is still operating upon those people, and its force precludes the idea that peace can ever come to Kansas, until it shall be fully admitted to the Union with its institutions all consolidated as a FREE STATE.

"This meeting attracted little public attention at the time, but it furnishes the key to all the subsequent history. Atchison has since explained the process by which he bullied and terrified Pierce and Douglas into the fatal measure of repealing the restriction. The Blue Lodges began to be formed immediately after; for it was testified before the Congressional Committee, by Jordan Davison, a Missourian and a Border Ruffian, that he was in a Blue Lodge at Pleasant Hill, Missouri, in February, 1854, the avowed object being to make Kansas a slave State, while the Nebraska Bill became a law on the 30th of June, 1854, and the Emigrant Aid Society of Boston held its first meeting on the 30th of July, 1854. A resolution was adopted on the 10th of June, at Parkville, Missouri, and within that and the following month was repeatedly adopted by other meetings both in Missouri and Kansas, debarring 'abolitionists' from entering Kansas, — in which term they include all friends of free labor, — declaring that the institution of slavery already existed in the Territory, and recommending to slave-holders to introduce their property as fast as possible."

You have here what purports to be a copy of a resolution passed at a public meeting in Platte County, in 1853, and then published in the Platte Argus. It seems that there can be no mistake, and that the determination was then

formed to make Kansas a slave State at whatever sacrifice of blood and treasure. The ambition of Douglas, and the fears of the President were appealed to for aid and support by a repeal of the Compromise; and thereupon the political Nebuchadnezzars, who ought to have been turned out to grass long since, erected an image, composed mainly of brass, styling it "squatter sovereignty;"—and General Cass fell down and worshipped it.

It is not necessary to detail to you how the doctrine, that the settlers of a territory have a right to determine their own institutions, has since been carried out in practice by those who promulgated it. The ruffians of Western Missouri, true to their determination to extend their institutions over Kansas, marched over the border well provided with bowie knives and revolvers, voted where that served their purpose, destroyed the ballot-boxes where that was better, drove the Free State voters from the polls, and elected a majority of the territorial legislature. A more gross case of usurpation never existed. But this was only the beginning of what is not yet ended. The usurping legislature met, turned out the members who were legally elected, and proceeded to pass a set of laws which would disgrace Turkey or Algiers. The inhabitants protested, and refused to recognize the authority of the usurpers, and were maltreated, beaten, and some of them murdered. They appealed to the United States authorities for protection; and the answer received reminded me at the time of an anecdote I read several years since, and which, being professional, has dwelt upon my recollection. A lawyer named Jones, with no great knowledge of the law, had become "cock of the walk" in one of the county courts of Virginia, and managed the court at his pleasure. A young lawyer settled in the county, and having superior pro-

fessional knowledge, interposed legal objections in one of Jones's suits, which the latter could not answer; and he thereupon became very much enraged, and swore profanely. The young advocate finally appealed to the court with the question, whether it was proper for Mr. Jones to swear in the presence of the court. The court held a grave consultation, and delivered judgment in this wise: "Mr. H., if you don't leave off making Mr. Jones swear so, the court will commit you." So seemed to be the answer of the general government to the appeal of the Free State settlers of Kansas for protection. "Gentlemen, if you don't leave off making these border ruffians commit all this violence, you shall be arrested for insurrection."

But the matter soon became too serious for a jest respecting it. The threats of arrest, it soon appeared, were no empty menace. To all appeals for protection, the answer was, "You must obey the laws." And what were the laws to which obedience was thus required? Permit me to give you a specimen of them.

"If any free person, by speaking or by writing, assert or maintain that persons have not the right to hold slaves in this Territory, or shall introduce into this Territory, print, publish, write, circulate, or cause to be introduced into this Territory, written, printed, published, or circulated in this Territory, any book, paper, magazine, pamphlet, or circular, containing any denial of the right of persons to hold slaves in this Territory, such person shall be deemed guilty of felony, and punished by imprisonment at hard labor for a term of not less than two years.

"No person who is conscientiously opposed to holding slaves, or who does not admit the right to hold slaves in this Territory, shall sit as a juror on the trial of any prosecution for any violation of any of the sections of this act.

"If any person offering to vote shall be challenged and required to take an oath or affirmation, to be administered by one of the judges of the election, that he will sustain the provisions of the above-recited acts of Con-

gress, [the Fugitive Slave Laws of 1793 and 1850,] and of the act entitled 'An Act to organize the Territories of Nebraska and Kansas,' approved May 30, 1854, and shall refuse to take such oath or affirmation, the vote of such person shall be rejected.

"Each member of the legislative assembly, and every officer elected or appointed to office under the laws of this Territory, shall, in addition to the oath or affirmation specially provided to be taken by such officer, take an oath or affirmation to support the Constitution of the United States, the provisions of an act entitled 'An Act respecting fugitives from justice and persons escaping from the service of their masters,' approved February 12, 1793; and of an act to amend and supplementary to said last-mentioned act, approved September 18, 1850; and of an act entitled 'An Act to organize the Territories of Nebraska and Kansas,' approved May 30, 1854."

"Every person obtaining a license shall take an oath or affirmation to support the Constitution of the United States, and to support and sustain the provisions of an act entitled 'An Act to organize the Territories of Nebraska and Kansas,' and the provisions of an act commonly known as 'The Fugitive Slave Law,' and faithfully to demean himself in his practice to the best of his knowledge and ability. A certificate of such oath shall be indorsed on the license.

"If any person shall practise law in any court of record, without being licensed, sworn, and enrolled, he shall be deemed guilty of a contempt of court, and punished as in other cases of contempt.

"Every person who may be sentenced by any court of competent jurisdiction, under any law in force within this Territory, to punishment by confinement and hard labor, shall be deemed a convict, and shall immediately, under the charge of the keeper of such jail or public prison, or under the charge of such person as the keeper of such jail or public prison may select, be put to hard labor, as in the first section of this act specified; and such keeper or other person having charge of such convict, shall cause such convict, while engaged at such labor, to be securely confined by a chain six feet in length, of not less than four sixteenths nor more than three eighths of an inch links, with a round ball of iron of not less than four nor more than six inches in diameter, attached, which chain shall be securely fastened to the ankle of such convict with a strong lock and key; and such keeper or other person having charge of such convict, may, if necessary, confine such

convict, while so engaged at hard labor, by other chains or other means in his discretion, so as to keep such convict secure and prevent his escape; and when there shall be two or more convicts under the charge of such keeper, or other person, such convicts shall be fastened together by strong chains, with strong locks and keys, during the time such convicts shall be engaged in hard labor without the walls of any jail or prison."

You perceive how cunningly devised this code was to secure the introduction of slavery into Kansas. All persons opposed to slavery were disfranchised and gagged. If they dared to speak even against the right to hold slaves in the territory, they were to be deemed guilty of felony, and subjected to imprisonment at hard labor for a term not less than two years, and might be let out to work on the public highway, fettered with a chain and ball, after the manner of those convicted of the most infamous crimes under the worst of despotisms.

Fellow-Citizens! If the people of Kansas had quietly submitted to this usurpation and oppression, they would have deserved to be slaves themselves; nay, the very act of submission would have made them slaves. The wrongs inflicted on the colonists by the mother country, which led to the Revolution, bear no comparison with this monstrous injustice.

The people attempted to relieve themselves in the only way which seemed to be practicable, without a resort to violence. Following the example set by the people of Michigan, they chose delegates to a Convention for the formation of a Constitution, in advance of an authority for that purpose, and asked for admission into the Union as a State. But what was good constitutional allegiance in Michigan, was treason in Kansas. A refusal to be gagged, was insurrection; and asking to be admitted into the Union as peacea-

ble citizens, desirous of escaping from oppression, was treason against the peace and dignity of the United States. The more prominent of the free State settlers who did not escape were arrested and imprisoned on this charge of treason, while reiterating their protestations of allegiance and devotion to the Union, and for the crime of seeking admission into it; and armed bands, coming from abroad to secure the ascendency of slavery by force, were let loose, to ravage the possessions of those whose only offence was that they were supporters of free institutions. Our fathers had no very favorable opinion of the Hessians in the war of the Revolution. But the Hessians were not volunteers in the attempt to subjugate the colonists, and committed no atrocities beyond those usually attendant upon a state of warfare. Not so with the bands of ragamuffins who have invaded Kansas. It has been said that civil war was raging there. My friends, let us do no injustice to civil war. It has horrors enough to answer for which properly belong to it. But the robbery and arson, the pillage and murder which have been rife in Kansas within the last year, are not civil war. I intend no pun in saying this. The case is too grave and sad for that. I mean to say that it is not war which has raged in Kansas; but it is rapine and destruction, and cold-blooded, wilful murder. We have been accustomed, when we wished to express our sense of the damning infamy of atrocious deeds of violence or plunder, in the superlative of condemnation, to characterize them as piracy, and the perpetrators as pirates. But it has been reserved to the Atchison men, and the Buford men, and the Titus men, and the Emory men, in Kansas, to make piracy comparatively respectable, inasmuch as they have shown that there is a depth of infamy more profound than pirate ever yet has sounded. The buccaneers of former

days did not hold out a false signal of equal rights, and then gag and plunder and murder their victims, under the hollow pretence of being a territorial militia, enforcing the laws.

The result of this horrible iniquity has been stated in the appeals for aid recently made to the people of the Eastern States. God grant that hearts may feel and hands may open as they never felt and opened before, in aid of the Free State settlers in Kansas, that the storms of the coming winter may not sweep over the desolate hearthstones of those who have perilled their all in the cause of freedom.

It has been said in high quarters and low quarters that all the difficulties in Kansas have been occasioned by the Emigrant Aid Society; that if it had not been for the interference of that Society, Kansas would in the natural course of things have come in quietly as a free State. But the resolution of the Platte County borderers, adopted before the Emigrant Aid Society was even thought of, show the utter hollowness and falsity of all such pretences. I have no authority to speak for the Emigrant Aid Society, and know nothing of its plans and purposes except what is before the public. I am willing to take it for granted that the main object of that society was to facilitate the introduction of settlers into Kansas with a view of making it a free State, and perhaps of ultimately deriving a profit to the corporation. If it were solely with the purpose of aiding in the settlement, with the view of securing the Territory to freedom, it was a perfectly legitimate object. The repeal of the Compromise opened the Territory to such efforts on both sides. It was just what was to have been anticipated. So long as the effort was made in good faith to promote actual settlement, no reasonable exception could be taken. — It was the introduction of those who were not settlers, for the purpose of voting and over-

awing the inhabitants, which furnished ground of complaint; and I have yet to learn that there is a particle of evidence that the Emigrant Aid Society has done any such thing. What has been charged upon it was that it paid the expenses of emigrants, which it had a perfect right to do, but which it denies having done.

I am aware that near the close of the examinations before the investigating committee of the House of Representatives, some testimony was introduced to the effect that two or three persons who were leaving the Territory just after the election, said the Emigrant Aid Society paid their expenses to come there and vote. Some reckless person may so have said, but I doubt it. If the declaration were made under the circumstances stated, it would furnish no proof against the society or its members. But no such charge was made or suggested until the damning proof of illegal voting by the Missourians required some set-off, if one could possibly be conjured up. And then came this proof of declarations by nobody knows who. It was entirely an after-thought. No one with a grain of common sense, and any knowledge of the facts, ever believed a word of it. It may be true that if Kansas becomes a free State it will be owing to the lawful and judicious action of the members of the society, counteracting the unholy projects of the border slave-holders, and the unscrupulous politicians. This is the head and front of its offending. Honor, then, to the Emigrant Aid Society. Honor to the City of Lawrence, which it founded, and to its Free State hotel, the walls of which still stand, notwithstanding the patriotic labors of the sheriff's posse. And, above all, and beyond all, honor to the stout hearts and strong arms which have resisted oppression, and abide the issue with the stern determination that Kansas shall be free.

It was but a matter of course that great interest should be manifested respecting the course of the different political parties on the subject in the impending presidential election. There are three parties in the field, and we have their platforms before us. It may be well to devote a few moments to a review of them. The Democratic Convention have collected together a mass of truisms about which no controversy exists, and reëndorsed their adhesion, nominally, to all that they have maintained heretofore. There is a declaration of eternal hostility to a National Bank. As the Bank was killed by General Jackson, about a quarter of a century ago, and Mr. Webster long since characterized it as an obsolete idea, this plank of the platform was probably designed as a wooden slab, to be placed over its grave. There is a resolution in favor of the veto power, and another against a system of internal improvements. But a democratic Senate having, within a few days, passed bill after bill making appropriations for internal improvements, over, and notwithstanding, the President's veto, it seems clear that these are shifting planks of the platform, which can be removed at any time when the party is in danger, if it stand too firmly upon them. There is a resolution in favor of the sub-treasury, respecting which no one now proposes a change; and one against fostering one branch of industry at the expense of another, which no one seeks to do. There is a resolution that it is the duty of the government to enforce and practise the most rigid economy in conducting our public affairs — exemplified by a most wasteful and extravagant expenditure whenever the party is in power; and one in favor of a strict construction of the Constitution — which the party uniformly construes in the most lax manner, or wholly disregards upon flimsy pretexts, whenever it suits their purposes. Witness, for ex-

ample, the admission of Texas, with an agreement that it shall be divided into five States, there being no constitutional authority for the admission, or the agreement. There are resolutions against the American party, the design of which is to secure the vote of the naturalized citizens, while the party privately makes love to the American party, and proposes a union whenever the defeat of the Republican party shall require it. So much for show and humbug ; and then comes the plank of planks, in the denunciation of the Republican party as a sectional party, in the support of the extension of slavery by the repeal of the Missouri Compromise, — in the nominal recognition of the right of the inhabitants of the territories to form their own institutions respecting slavery, — a principle which the party were violating in Kansas at the very time it was promulgated ; closing with a call upon the next administration for every proper effort to secure our ascendency in the Gulf of Mexico ; which means, being interpreted, that measures be taken to give Cuba the opportunity to form her institutions, in the faith that she cannot form them amiss in relation to slavery.

The American party, or rather the southern section of it, after a political thanksgiving, presents the perpetuation of the Federal Union, the recognition of the reserved rights of the States, non-intervention in those things that belong exclusively to individual States — opposition to a union between church and state — investigation into abuses, and strict economy ; respecting all which, that party has no distinctive features. There is, besides, the maintenance and enforcement of all laws, until said laws shall be repealed, or shall be declared null and void by competent judicial authority, which is broad enough to embrace the enforcement of the laws of the usurping legislature of Kansas, and was probably de-

signed to cover that very case, in the slave-holding States at least. Witness the nomination of Donelson, to say nothing, just now, of Mr. Fillmore. The remaining portion relates mainly to the distinctive principle of that party, that "Americans must rule America."

The Republican party, addressing its call to all without regard to past differences, who agree in its principles, first resolved "that the maintenance of the principles promulgated in the Declaration of Independence, and embodied in the Federal Constitution, are essential to the preservation of our republican institutions, and that the Federal Constitution, the rights of the States, and the union of the States, shall be preserved." This, with an indorsement of some particular principles of the Declaration and of the Constitution may be regarded as "the glittering and sounding generalities" of the platform. The application of these principles to the non-extension of slavery, with a recital of the wrongs of Kansas and a resolution in favor of her admission under the Topeka constitution, the denunciation of the highwayman's plea, that "might makes right," and a declaration of opposition to all legislation impairing the security of liberty of conscience and equality of rights among citizens, furnish the fanatical and sectional portion of it. There is besides a support of a rail-road to the Pacific, and other internal improvements of a national character.

There is nothing in the platform of either of these parties adverse to the integrity of the Union. On the contrary, each professes its entire devotion to it. And the Union is in just about as much danger from the success of one as that of another. The dissolution of the Union is not dependent immediately upon the issue of this election. The great, the all absorbing issue in the controversy is the extension or

non-extension of slavery into Kansas, and the Union is eventually in quite as much danger from its extension as from its non-extension, although there is not so much said about it. I am free to admit, that if slavery is imposed upon Kansas and such a monstrous iniquity as has occurred shall be approved, my faith in the virtue and capacity of the people to sustain a wise and just republican government will be somewhat shaken. If the people so decide, "God save the Commonwealth." But they are too much aroused just now to permit any such thing. Of prophesies and threats there has been an abundance. It is asserted that somebody has said, "if slavery is extended, the Union is worthless and ought to be dissolved." And somebody has said, that if sixteen States elect a President, fifteen States won't stand that. And somebody else has said, that if Colonel Fremont is elected it will be the duty of somebody to march to Washington and seize the archives and the treasury. I had rather have the sub-treasury at New York than the treasury. These exhibitions of froth and folly are not all on one side of any particular line. Nor do the people who make them all wear petticoats; but it is true that some of them come from old grannies, whose age and experience should have taught them better.

We have seen that the real issue in the present Presidential canvass is between the Democratic and the Republican parties, — the extension or the non-extension of slavery. All other matters are at this time of minor import. The distinctive principle of the American party, be it good or bad, is out of sight at present, swallowed up in the all absorbing question whether slavery shall be imposed upon Kansas. The party may perhaps preserve its organization. The result of its action in this election will avail it nothing further;

but its capacity for mischief by a pertinacious adherence to its candidates may be very great.

What is the duty of the Whigs? What is now the duty of those who, with a steady adhesion to their principles and a cheerful devotion to the cause, have followed the glorious Whig banner so long as it was flung to the breeze, alike conscious of a faithful performance of duty, whether in victory or defeat?

Some of those who have heretofore been prominent members of the Whig party have announced their intention to support Mr. Buchanan. It has been reported, that a distinguished gentleman of our own State upon being rallied upon his transition from the Whig to the Democratic party, replied, that if he was about to leave the ranks of Orthodoxy he would not stop at Arminianism, but would go on to infidelity at once. What a marvellous felicity of illustration that gentleman possesses!

Another gentleman known as a Whig, a senator from Missouri, in declaring his intention to vote for Mr. Buchanan, says, "while I cannot approve and do not intend to adopt the platform of principles promulgated by the late Democratic convention at Cincinnati, I feel assured that notwithstanding the exceptional doctrines it announces, especially those referring to our foreign relations, the administration of Mr. Buchanan would be safe, prudent, and conservative." For myself, I do not understand this support of Mr. Buchanan without adopting his platform. It is said that he is the platform. There is no such separation to be made. If you vote for the man, you vote for the platform, for he is pledged to it. A man may

> "Steal the livery of the court of heaven
> To serve the devil in."

But the service he performs will be a devilish service, and the anthems he sings will not be "holiness to the Lord." A man may train in the Democratic ranks with a Whig overcoat on, but he must hurrah for the Democratic candidates and keep step to the music of the Democratic party. The outward habiliments will not determine the character. The ass covered his shoulders with the lion's skin, but the tremendous roar which he expected would follow turned out to be nothing but the bray of the donkey, after all.

Let no Whig vote for Mr. Buchanan with the supposition that the Democratic party have changed their policy respecting Kansas. Up to the time of the election in Maine, no measures were taken by the administration for the relief of the Free State settlers. To all appeals the answer was, "Obey the laws." Mr. Governor Geary, upon whose appointment there were some hopes of an intention to mete out a better measure of justice, made haste very slowly to assume the duties of his office, notwithstanding the disorders which it was his duty to suppress were most notorious. It seemed as if he was purposely kept back until that election should give some indication of the feeling of the people. If every thing went well in Maine, then Woodson might be left to follow the course of Shannon, and the banditti permitted to pursue their ravages as territorial militia. The eighteen thousand pounder in Maine struck terror and dismay into the administration at Washington, and the echoes were forthwith heard in Kansas. Mr. Geary made all speed about that time to his government, and the St. Louis News, before he reached that point, proclaimed that there was a lull in the affairs of Kansas. Atchison, with his invading army, was probably told, "It won't do, you must go back or Buchanan will be defeated;"—while the arrest of some 130 Free State

men on a charge of treason and murder, for attacking those who had been committing depredations upon them, may serve to satisfy even the border ruffians that their interests are well cared for in the mean time. How long the "lull" will last, remains to be seen. Whether the storm will rage again may depend upon which way the wind blows on the 4th of November.

Others of the Whigs, not being willing to go to the ———, I beg your pardon, gentlemen, — not being willing to go into infidelity in this way, have sought some other association. A convention calling itself a Whig Convention, was held a short time since in this State. That there were Whigs in it I have no doubt; but there is some evidence that it was not a Whig convention. The suppression of a reasonable discussion, and by unearthly noises, is neither Whig principle nor Whig practice. But let that pass. You doubtless looked with solicitude for the views of the convention upon the great question of the canvass, — the only question of practical importance. The presiding officer, professing to give a somewhat full and formal expression of opinion in relation to the momentous issues now before the people of the United States, says of Kansas, —

"I cannot forget, moreover, that there are diseases in the political, as well as in the physical system, for which mere local applications and mere topical treatment are utterly insufficient and often injurious, and where the only hope of a radical cure is in purifying and invigorating and building up anew the general health of the patient. Wise physicians in such cases prescribe what I believe they call an *alterative* medicine. And this deplorable Kansas malady will, in my opinion, prove to be precisely one of this class of disorders. It demands an *alterative;* and those who rely so much upon direct applications for the relief of the superficial symptoms, distressing as they are, will find themselves, I fear, grievously disappointed."

It appears to me that the symptoms have not been very

superficial. We all agree that an alterative is necessary; but what is to be the particular medicine? Pills of lead and powders of gunpowder are very powerful alteratives, but they do not generally improve the condition of the patient.

There is some significance in the inquiry afterwards made by the presiding officer in the course of his speech. What had a Republican House of Representatives "accomplished for suffering, bleeding Kansas?" (Not very superficial!) Adding, "does any man here doubt that if men of less extreme and extravagant views, men more conciliatory and practical in their purposes, had been in Congress, those odious and abhorrent Kansas laws would have been repealed before the session closed?" How this repeal might have been accomplished is not said. Men more conciliatory and practical in their purposes, might probably have obtained a repeal of some of those odious and abhorrent laws by the *compromise* of voting for Toombs's bill, which would assuredly have sealed the fate of Kansas, and made it a Slave State beyond redemption.

Another distinguished speaker, and a personal friend, said: —

"How any man can acquit the administration of President Pierce from being the source and origin of most of the disorders which are now distracting that region and spreading their exciting influence over the country, I cannot see. I admit that all the elements of trouble in that territory are not directly chargeable to the administration; but the administration was responsible, — first, for the repeal of the Missouri Compromise, and then for its course in countenancing the illegal votes from a neighboring region which put into power a legislature which had the forms of law, but which in its election and rule was an embodiment of injustice; and for giving its support to the measures of that body, which are disgraceful to humanity, disgraceful to liberty, and disgraceful to the spirit of the age. Now the duty of the administration was as plain as the light of the sun at noonday. The whole of this work should have been undone. This legislature should have

been sent home, and the whole of their legislative action should have been annulled, as the acts of a legislature which had no right to sit."

This is good sound Whig doctrine. But see what immediately follows: —

"The difficulty about Kansas is that it is a card in the hands of politicians during the coming campaign. When the truth about Kansas is known, you will find that some of the men who have been most loud in denouncing the Kansas outrages, have been the most vigorous in preventing the measures which are calculated to give peace to that territory."

This sounds very much as if the Republicans, who have certainly been most loud in denouncing the Kansas outrages, have prevented the adoption of such measures as the speaker had just said ought to have been taken. But he will hardly assert that. The Republicans held the card, if there was a card of that sort to be played. Why did not the Administration trump that card? They held the trump, in the shape of the admission of Kansas under the Topeka constitution. That would not only have taken the card, but would have ended the game, so far as Kansas was concerned. But that was just what the slave-holding partners of the Democracy would not consent to do.

What measures have the Republican party prevented, which were calculated to give peace to Kansas? Why, they have prevented the passage of Toombs's bill; and they have most vigorously refused to compromise in such a manner that slavery will make sure of Kansas.

The presiding officer, referring to the possible success of the Democratic party, identified as it is with the overthrow of the Missouri Compromise and the unjustifiable foreign policy disclosed and avowed in the Ostend Conference, says: —

"I can see before us no promise, and but little prospect, of either domestic or foreign peace. There is no alterative here. On the contrary, such a result presents to my mind nothing but an indefinite continuance and prolongation of that wretched state of things which has distressed the heart of every true patriot for the last six or seven months, — fears without and fightings within, the abomination of desolation standing where it ought not, fresh conflicts upon our own soil springing from the squatter sovereignty doctrines which have been so disastrously inaugurated in Kansas, and fresh panics of war with foreign powers, disturbing our trade and finances, and followed, perhaps, by the dread catastrophe itself."

But he adds: —

"If I turn, on the other hand, to a contemplation of the triumph of the Republican party, I perceive clouds and darkness, by no means less dense or threatening, resting upon the future of our domestic peace."

Now, the main purpose of the Republican party is to prevent the accomplishment by the Democratic party of what it is here said is the very "abomination of desolation." So it seems that it is just about as dangerous to prevent iniquity as it is to commit it.

The Convention resolves that the fierce and dangerous elements of discord let loose by the repeal of the Missouri Compromise, "can never be put to rest until that healing measure shall be practically reënacted, and the territory once solemnly dedicated to freedom be received into the Union as a free State." And then they cannot refrain from expressing their preference for Mr. Fillmore. That is, in other words, a recommendation to vote for him. What, and Donelson, too? Yes, and Donelson, too! You cannot scratch that ticket, because you vote for electors, who, if they vote for Fillmore, will vote for Donelson, too. Well, what kind of a Whig is Mr. Donelson, "I should very much like to know!" A Democratic slaveholder of Tennessee, on the South American

ticket, editor of the Washington Union during Mr. Fillmore's administration, and an "uncompromising opponent of Whig men and measures, — condemning indiscriminately" all of it that was Whig. How far is Mr. Donelson likely to promote the admission of Kansas as a free State, or to oppose the acquisition of Cuba for the express purpose of adding more slave territory?

But is there any expectation on the part of the Convention, that Mr. Fillmore can be elected? Hardly. The presiding officer is "prepared, if need be, to try how it feels to vote without any State at all," although he hopes better things. Rather faint, that. But my eloquent friend is more explicit:—

"Only stand firm," he says, "only let us weather this next point, and depend upon it, we shall have smoother seas, and more favoring gales the next year. I only ask you, while you are firm, while you are zealous, to be also patient and forbearing to one another. The duty that is at this moment laid upon the Whig party is one that most tries the temper and the soul of man. It is that which calls for the exercise of the passive virtues, and they are always harder to bring out than the active virtues. It is an easy thing, when the trumpet sounds, when the air rings and burns with exhilarating shouts, when the pulse beats high, and the blood in the veins seems turned into liquid fire, — it is easy then to fling one's self into the face of the enemy, and meet victory or death. But to stand still, and have your ranks mowed down by the enemy's artillery, — to see your friends and brothers falling on each side, — to hear no word but the calm grave voice of the commander, 'Close up your ranks, boys, and show a firm front to the foe,' that is hard; but we are of the stuff that can do it."

So it appears that at a time of great excitement in the country, while there are fears without and fightings within; while the abomination of desolation stands where it ought not; while there is no promise and but little prospect of either

foreign or domestic peace in the success of the Democratic party, which has originated all the troubles, while a great battle is to be fought between slavery and freedom, the Whig party is to denounce the Republican party, which does battle for freedom, as one upon whose success clouds and darkness rest, and to be brought into the field, standing shoulder to shoulder, — *to fire at a target.*

If this is done, it is thought that the party will live to fight another day.

"Depend upon it, Mr. President," (says the last speaker,) "the time will come when the tide of battle will turn; when 'either night or the Prussians will come,' as Wellington said at Waterloo; when along our ranks will ring, as did there, the stirring words, 'Up, Guards, and at them.'"

At whom? Why, the victorious party, whichever it may be, intrenched in the government fortifications. It would be unkind to make such a charge upon the remnant of the vanquished.

Mr. President! when that command shall speed over the hills, and echo along the valleys of New England, I doubt not that there will be a mustering of gallant riders, and an exhibition of noble horsemanship. But the roll call will show about the number of the glorious six hundred at the battle of Balaklava, — the charge will accomplish as much for the purposes of the war, — and there will be not far from the same proportion of empty saddles.

Fellow-Citizens! I may be old, but I am no fogy. If there is to be a great political battle, in which the slave power, assuming the name of Democracy, is arrayed against the personal liberty of one class of the people, and against the equal political rights of another class, I wish to enroll

myself in the ranks and do a yeoman's service. I cannot be brought into the field in the heat of the battle, under any leaders, — to shoot at a mark.

But I have other reasons why I cannot vote for Mr. Fillmore. Mr. Fillmore in the Presidential chair was not the same Whig Mr. Fillmore who was previously a representative in Congress. And Mr. Fillmore deserting the Whig party upon its defeat in 1852, and joining a party whose distinguishing principle, be it good or bad, is not a Whig principle, — is no kind of a Whig. Moreover, Mr. Fillmore, on his return from Europe this summer, made a speech at Albany. I could not find it in one of his Boston organs the other day, where his speeches at Newburg and Rochester and other places on his route seemed to be stereotyped; but copies of it are extant, and these are extracts: —

"We see a political party, presenting candidates for the Presidency and Vice-Presidency, selected for the first time from the free States alone, with the avowed purpose of electing these candidates by suffrages of one part of the Union only, to rule over the whole United States. Can it be possible that those who are engaged in such a measure can have seriously reflected upon the consequences which must inevitably follow, in case of success? (Cheers.) Can they have the madness or the folly to believe that our Southern brethren would submit to be governed by such a Chief Magistrate?

"Suppose that the South, having a majority of the electoral votes, should declare that they would only have slave-holders for President and Vice-President, and should elect such by their exclusive suffrages to rule over us at the North? Do you think we would submit to it? No, not for a moment. (Applause.) And do you believe that your Southern brethren are less sensitive on this subject than you are, or less jealous of their rights? (Tremendous cheering.) If you do, let me tell you that you are mistaken. And, therefore, you must see that if this sectional party succeeds, it leads inevitably to the destruction of this beautiful fabric reared by our forefathers, cemented by their blood, and bequeathed to us as a priceless inheritance."

This is a direct encouragement to insurrection, or secession by the slave-holding States, if the Republican candidate is elected; and all the more exceptionable coming from his competitor. It is not surprising that there have been divers glosses upon it, attempting to show that Mr. Fillmore did not mean what he said; but the meaning is quite plain, and if the truth were known, probably much of the violence and threats, of which we hear not a little, might be traced to it.

But suppose Mr. Fillmore had a chance of success. I do not wonder that this supposition provokes your laughter; but what is called a National Whig Convention has recently been held at Baltimore, and has indorsed, the nominations of the American party, and expressed something like a confidence in his success. I deny the authority of a portion of the Whigs to indorse the nominations of another party in the name of the Whig party. But being thus indorsed how is the election to be accomplished, and what is to be the result? The answer is clear. By defeating an election by the people, throwing it into the House of Representatives, and then standing out in the expectation that the Democratic party will give in. An election is thus to be postponed, — the whole country convulsed with the excitement which will attend it, — and the matter is to be accomplished at last by bargain and corruption, making Kansas the subject of a compromise. Compromising seems to have been considered as Mr. Fillmore's peculiar qualification in the convention at Boston. The presiding officer evidently regarded compromising with favor: —

"In my honest judgment, fellow Whigs, if these perplexing and perilous questions are ever to be settled wisely, justly, and peaceably, it will not be by the triumph of either of the principal parties to the strife."

Another speaker is again more explicit, —

"Now Mr. Fillmore has the support of many members of the Whig party on the ground that he is a man of that moderation of temper who will reconcile the extremes of opinion on both sides. Nothing but harm can come, if this attitude of opposition and collision between the North and South is to continue. Millard Fillmore stands in the position of a man who takes that moderate part which is never tasteful to the American people. It is one of the characteristics of the people to favor extreme measures. Moderation, conciliation, and compromise — that class of qualities and that class of virtues — is not taking to the common American mind."

This is somewhat more clearly foreshadowed in the Baltimore Convention. — But what is the compromise? The question is, Shall slavery be extended into Kansas — Yes or No? If you say no, you do not compromise. If you say yes, you surrender. The election of Mr. Fillmore, then, is compromise, and compromise is surrender.

But it is objected that the Republican party is a fanatical party and a sectional party, and that it is seeking to deprive the Southern States of their rights under the constitution. Some of this was said in the speeches at the convention in Boston. More by the speakers from the free States at the Convention in Baltimore, and all of it is iterated and reiterated by the Democratic party, aided, as we have seen, by Mr. Fillmore himself. In reading the proceedings of the Baltimore Convention, I was struck with the fact that gentlemen from the slave-holding States hardly referred to the Republican as a sectional party, while those from the free States were open-mouthed in that style of denunciation. A delegate from New York "referred at some length to the duty of the South to stand by those Whigs of the North in support of Mr. Fillmore — to the necessity of the maintenance of the Union, despite the fanatical efforts of the abolitionists of the North."

It is amusing to contrast this with a remark of Mr. Alexander Rives of Virginia, who said, "I hail from the South — my heart throbs with every emotion that can touch the heart of a Southern man. But yet I tell you that from my heart of hearts, I loathe the Northern man with Southern principles. [Applause.] Bring a man from the extreme North, and set him down in my own cherished domicil, and let him strive to outvie me in praises of the institutions of the South, and I say he ought to be kicked out of doors."

Fellow-citizens, I do not recognize the old Anti-slavery party, nor even the Freesoil party proper, in the present Republican party. With something in common with the former, and much with the latter, it is not the same. The Republican party presents, as its great distinguishing principle, the non-extension of slavery, and I propose to show that this is a sound Whig principle, and a constitutional principle, — which once might have been said to be the same thing.

To show it to be a Whig principle, I need go no farther back than the 29th of September, 1847. On that day the Whig party of Massachusetts held a convention at Springfield. Mr. Webster was present, "and addressed the meeting in his most powerful manner for nearly an hour and a half. His speech was devoted to a review of the war and its origin, and the policy of the administration with regard to it." Two or three short extracts from that speech may be found useful.

"My opposition [to the annexation of Texas] was founded on the ground that I never would, and never should, — I repeat now, I never will and never shall, — give my vote in Congress for any further annexation to this country with a slave representation. . . .

"We hear much, just now, of a panacea for the danger and evils of slavery and slave annexation, which they call the Wilmot Proviso. That sentiment is a just sentiment, but it is not a sentiment to form any new party

upon. It is not a sentiment on which Massachusetts Whigs differ. There is not a man in this hall who holds to it any more firmly than I do, or one who adheres to it more than another. I feel some little interest in this matter, Sir. Did I not commit myself in 1837 to the whole doctrine, fully, entirely? And I must be permitted to say that I cannot quite consent that more recent discoverers should claim the merit and take out a patent. I deny the priority of their invention. Allow me to say, Sir, it is not their thunder." . . .

"We can only say, and in my judgment, Mr. President, I can only say, that we are to use the first, the last, and every occasion that offers to oppose the extension of slave power. But I speak of it here as in Congress, as a political question for statesmen to act upon. We must so regard it. I certainly do not mean to say it is less important in a moral point of view, — that it is not more important in many other points of view. But as a legislator, or in an official capacity, I must look at it, consider it, and decide it, as a matter for political action."

The platform of that convention contained a very full and emphatic annunciation of Whig principles. It was resolved, among other things,

"That the acquisition of Mexican territory, under the circumstances of the country — unless under adequate securities for the protection of human liberty — can have no other probable result than the ultimate advancement of the sectional supremacy of the slave power.

"That if the war shall be prosecuted to the final subjugation or dismemberment of Mexico, the Whigs of Massachusetts now declare, and put this declaration of their purpose on record, — that Massachusetts will never consent that Mexican territory, however acquired, shall become a part of the American Union, unless on the unalterable condition that 'there shall be neither slavery nor involuntary servitude therein, otherwise than in the punishment of crime.'

"That, in making this declaration of her purpose, Massachusetts announces no new principles of action in regard to her sister States, and makes no new application of principles already acknowledged. She merely states the great American principles embodied in our Declaration of Independence — the political equality of persons in the civil State; — the principle adopted in the Legislation of the States under the confederation, and sanctioned by

the Constitution; in the admission of all the new States formed from the only territory belonging to the Union at the adoption of the Constitution; — it is, in short, the imperishable principle set forth in the ever memorable ordinance of 1787, which has for more than half a century been the fundamental law of human liberty in the great valley of the Lakes, the Ohio and the Mississippi, with what brilliant success, and with what unparalleled results, let the great and growing States of Ohio, Indiana, Illinois, Michigan, and Wisconsin, answer and declare.

"And that uncompromising hostility to all wars for conquest, and to all acquisitions of territory in any manner whatever, for the diffusion and perpetuity of slavery, and for the extension and permanency of the slave power, are now — as they have been — cardinal principles in the policy of the Whigs of Massachusetts, and form, in their judgment, the broad and deep foundations on which rest, and ever must rest, the prospective hopes, and enduring interests of the whole country."

There has been no repeal of these resolutions.

With regard to Mr. Webster, who may be allowed by the Whig friends of Mr. Fillmore to have been a sound exponent of Whig principles, his opposition to the extension of slavery was distinctly expressed in a speech at Niblo's Garden in New York, in 1837; and he adhered to it throughout his whole life.

When the bill to establish a territorial government in Oregon was under consideration in August, 1848, Mr. Webster said: —

"For one, I wish to avoid all committals, all traps by way of preamble or recital; and as I do not intend to discuss this question at large, I content myself with saying, in few words, that my opposition to the further extension of local slavery in this country, or to the increase of slave representation in Congress, is general and universal. It has no reference to limits of latitude or points of the compass. I shall oppose all such extension and all such increase, in all places, at all times, under all circumstances, even against all inducements, against all supposed limitation of great interests, against all combinations — against all compromises. This is short, but I hope clear and comprehensive."

It may be noted as a curious piece of political history, that Mr. Douglas moved an amendment to the bill, in favor of extending the Missouri Compromise to the Pacific Ocean, which was adopted by the following vote: —

YEAS — Messrs. Atchison, Badger, Bell, Benton, Berrien, Borland, Bright, Butler, Calhoun, Cameron, Davis of Mississippi, Dickinson, Douglas, Downs, Fitzgerald, Foote, Hannegan, Houston, Hunter, Johnson of Maryland, Johnson of Louisiana, Johnson of Georgia, King, Lewis, Mangum, Mason, Metcalf, Pearce, Sebastian, Spruance of Delaware, Sturgeon, Turney, and Underwood. Total, 33.

NAYS — Messrs. Allen, Atherton, Baldwin, Bradbury, Breese, Clarke, Corwin, Davis of Massachusetts, Dayton, Dix, Dodge, Felch, Green, Hale, Hamblin, Miller, Niles, Phelps, Upham, Walker, and Webster. Total, 21.

In Mr. Webster's speech "for the Constitution and the Union," March 7, 1850, there was no surrender of his opposition to the extension of slavery. While he declared that if a proposition were before Congress to establish a government for New Mexico, and it was moved to insert a provision for a prohibition of slavery, he would not vote for it, giving as a reason that "such prohibition would be idle as it respects any effect it would have upon the territory, and he would not take pains uselessly to reaffirm an ordinance of nature, nor to reënact the will of God," — he caused extracts from his speeches in 1837 and 1847 to be read as evidence of his uniform opinions, and added:

"Sir, wherever there is a substantive good to be done, wherever there is a foot of land to be prevented from becoming slave territory, I am ready to assert the principle of the exclusion of slavery. I am pledged to it from the year 1837; I have been pledged to it again and again; and I will perform those pledges; but I will not do a thing unnecessarily that wounds the feelings of others, or that does discredit to my own understanding."

It is in the face of this declaration that it has been impudently said that the compromise measure of 1850 repealed the Missouri Compromise. One extract more, and that on his reception at Buffalo in 1851.

"I never would consent, and never have consented, that there should be one foot of slave territory beyond what the old thirteen States had at the time of the formation of the Union. Never! never!"

Mr. Clay also was opposed to the further extension of slavery. In the debates of 1850 he is reported to have said:

"I am extremely sorry to hear the senator from Mississippi say that he requires, first, the extension of the Missouri Compromise line to the Pacific, and also that he is not satisfied with that, but requires, if I understood him correctly, a positive provision for the admission of slavery south of that line. And now, sir, coming from a slave State, as I do, I owe it to myself, I owe it to truth, I owe it to the subject, to say that no earthly power could induce me to vote for a specific measure for the introduction of slavery where it had not before existed, either south or north of that line. Coming, as I do, from a slave State, it is my solemn, deliberate, and well-matured determination, that no power, no earthly power, shall compel me to vote for the positive introduction of slavery either south or north of that line.

* * * * * * * *

"But if, unhappily, we should be involved in war, between the two parts of this confederacy, in which the effort upon the one side should be to restrain the introduction of slavery into the new Territories, and upon the other side to force its introduction there, what a spectacle should we present to the astonishment of mankind, in an effort, not to propagate rights, but, I must say it, though I trust it will be understood to be said with no design to excite feeling, — a war to propagate wrongs in the Territories thus acquired from Mexico. It would be a war in which we should have no sympathies, — no good wishes; in which all mankind would be against us; in which our own history itself would be against us; for, from the commencement of the Revolution down to the present time, we have constantly reproached our British ancestors for the introduction of slavery into this country."

These extracts show the Whig faith in relation to the extension of slavery, into which I have been baptized; and with this creed before me, I may well believe that Whigs who are willing that slavery should be farther extended, are following after strange political gods.

But the argument to show that the opposition of the Republican party to the extension of slavery is not fanatical or sectional; but that it is for the preservation, thus far, of equal rights on the part of all the people in the national representation; and that it is therefore a constitutional measure; may be extended much beyond the proof that it has heretofore had the support of the Whig party and its most eminent leaders.

The representation in the House of Representatives is politically unequal. The representation of the non-slave-holding States is based upon free population; — that of the slave-holding States upon free population, with the addition of a further representation of three fifths of their slaves; which they insist are property. The slave-holding States have *twenty-one* members, by reason of their slave representation. This is clearly not an equality of representation. If the slaves are persons, entitled to be represented as such, there is no reason for this discrimination. If they are regarded as property, there is just as much reason for a representation founded on the laboring animals which aid in performing the work upon a farm in a non-slave-holding State.

That the slave is not a person who is represented in the national government, is very obvious. He never votes. It may be answered that the women and children of the non-

slave-holding States do not vote; which is very true. But the women rear and train those who are one day to exercise the right of suffrage, and the children are coming forward as the compeers or successors of those who do exercise it. Both classes are therefore directly interested in its exercise, and form a part of the constituency of the representative. They are represented, and free population is therefore a suitable basis on which to apportion a representation. Not so with the slave. He is not a part of the constituency. No age qualifies him, no property, if there be a property qualification, ever entitles him to any participation in the elective franchise. The nurture and training of those who are to exercise it, and which is to qualify them for its exercise, is not committed to him. Slaves may minister to the mere physical wants of those who do, and those who are to exercise this franchise, but they do not imbue their minds with free principles and high aspirations. They are in no way an element of a free government. The representation, then, so far as they are concerned, is the representation of the master; and it is founded upon property. It is not to be denied that property *may* form the basis of representation. It has been contended that as it pays the greater portion of the taxes, it furnishes a suitable and proper basis of representation, to some extent. It was so contended in the Convention to revise the Constitution of this Commonwealth in 1820. But the question returns; — viewed as property, why should three fifths of this peculiar species of property furnish a basis of representation, while all other property is entirely excluded? The solution of this question will be found in the history of the Constitution, and that of the period which immediately preceded its formation.

So far as this representation is constitutional, it has its

existence in the second section of the first article of the Constitution, in these words, — "Representation and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons." The reason why this should be the rule is certainly not apparent, but a short investigation will solve the mystery.

Bills of credit were first resorted to as a means for carrying on the war of the Revolution, but it soon became apparent that the credit of the bills must be sustained by means for their redemption. On the 26th December, 1775, Congress resolved that the thirteen Colonies be pledged for their redemption, — "that each Colony provide ways and means to sink its proportion in such manner as will be most effectual and best adapted to the condition, circumstances, and equal mode of levying taxes in each; and that the proportion or quota of each respective Colony be determined according to the number of inhabitants of all ages, including negroes and mulattoes, in each."

The Committee which reported the articles of Confederation in July, 1776, inserted a similar provision, with an exception of Indians not paying taxes. Upon this a debate arose. Mr. Chase moved that the quotas should be fixed by the number of white inhabitants. He admitted that taxation should be always in proportion to property; that this was in theory the true rule, but that from a variety of difficulties it could never be adopted in practice. He considered the number of inhabitants a tolerably good criterion of property, and

that this might always be obtained, and was the best mode with one exception only. He observed that "negroes are property, and as such could not be distinguished from the lands or personalties held in those States where there are few slaves; that the surplus of profit which a northern farmer is able to lay by he invests in cattle, horses, &c., whereas a southern farmer lays out the same surplus in slaves; that there was no more reason, therefore, for taxing the Southern States on the farmer's head and on his slave's head, than the Northern ones on their farmers' heads and the heads of cattle; that the mode proposed would therefore tax the Southern States according to their numbers and their wealth conjunctly, while the Northern would be taxed on numbers only; *that negroes in fact should not be considered as members of the State more than cattle, and that they have no more interest in it.*"

Fellow-citizens, please bear in mind that you have here, very fully stated, the slave-holding view of the relation of slaves to the State, showing, conclusively, that they are not represented, and form no part of the basis of an apportionment of representation, unless the basis adopted be property. It does not follow, however, that they are not, as property, just subjects of taxation.

Mr. John Adams observed that the numbers of people were taken by the article as an index of the wealth of the State, and not as subjects of taxation; — that five hundred freemen produced no greater surplus for the payment of taxes than five hundred slaves; — therefore the State in which are the laborers called freemen should be taxed no more than that in which are those called slaves.

Mr. Harrison proposed, *as a compromise, that two slaves*

should be counted as one freeman. He *affirmed that slaves did not do as much work as freemen, and doubted if two effected more than one.*

Mr. Wilson said that other kinds of property were pretty equally distributed through all the Colonies; there were as many cattle, horses, and sheep in the North as the South, and South as the North, but not so as to slaves; that experience has shown that those Colonies have been always able to pay most which have the most inhabitants, whether they be black or white; and the practice of the Southern Colonies has always been to make every farmer pay poll-taxes on his laborers, whether they be black or white. He acknowledged that freemen worked the most, but they consumed the most also, and did not produce a greater surplus for taxation. The slave was neither fed nor clothed so expensively as a freeman.

Dr. Witherspoon was of opinion that the value of lands and houses was the best estimate of the wealth of a nation, and that it was practicable to obtain such a valuation. He said the cases stated by Mr. Wilson were not parallel; that in the Southern Colonies slaves pervade the whole Colony; but they do not pervade the whole continent; and that the original resolution of Congress to proportion the quotas according to souls, was temporary only, and related to the moneys before emitted; whereas they were then entering into a new compact, and stood on original ground.

The amendment of Mr. Chase was rejected, five States for, six against it, and one divided.

The rule suggested by Dr. Witherspoon was afterwards substituted for that reported by the Committee, but the final ratification of the articles did not take place until March, 1781. In the mean time, Congress apportioned various sums

to be raised by each State, with a proviso that the sums required should not be considered the proportion of any one State, but should be placed to their credit, and interest allowed until the quota should be finally adjusted by Congress, agreeably to the rule inserted in the articles of Confederation.

This rule was found to be impracticable. In 1778 Congress required the States to make a return of the houses and lands. New Hampshire alone complied; and in 1783 Congress adopted a new article on the subject, to be proposed to the States, providing that the quotas of the several States should be supplied "in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes in each State."

Eleven States had assented to the change at the time of the formation of the Constitution, and we have here substantially the provision which was afterwards inserted in that instrument as the basis of representation, as well as of taxation. In an address to the States, recommending the adoption of this and other articles of amendment, it was said that the only material difficulty which attended the change of the rule, in the deliberation of Congress, was to fix the proper difference between the labor and industry of free inhabitants and all other inhabitants; and that the ratio ultimately agreed on was the effect of mutual concession. The concession seems to have been in rating the value of the labor of five slaves, the same as that of three freemen; not quite two to one, according to Mr. Harrison's proposition.

The inquiry naturally arises, why three fifths of the slaves,

which had been introduced into the basis of taxation because slaves were taken as an index of the wealth and ability of the masters to contribute and pay, should also be made the basis of a representation founded on population, when they are not represented, and have no part or lot in that matter? The answer is, that this was the result of *another compromise.*

The mode to be adopted in voting under the Confederation was the subject of great debate in Congress. The article adopted was in these words: "In determining questions in the United States in Congress assembled, each State shall have one vote." The larger States contended strenuously for a representation according to numbers.

Mr. Wilson thought that taxation should be in proportion to wealth, but that representation should accord with the number of freemen; that government is a collection of the wills of all; that if any government could speak the will of all, it would be perfect; and that so far as it departs from this, it becomes imperfect.

But the small States carried their point.

In the Convention for the formation of the Constitution, the different subjects were first discussed on resolutions; afterwards on reports of Committees to which different propositions were referred; and then upon a draft of a Constitution reported by the Committee of Detail. In this mode, and in incidental discussions when other parts of the Constitution were under consideration, the subject of representation was many times before the Convention, and in different connections. The plan of a National Government introduced by Mr. Randolph of Virginia, with the concurrence of his colleagues, asserted that the right of suffrage ought to be

proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule might seem best in different cases. On taking it up for consideration in Committee, after propositions to amend so as to adopt the one or the other of those modes, Mr. Madison moved that an equitable ratio ought to be substituted for the equality established by the articles of Confederation; but the matter was postponed on the suggestion that the Deputies from Delaware were restrained by their commission from assenting to any change. It was feared "that the large States would crush the small ones whenever they stand in the way of their ambitious views."

It was suggested, in answer, that all the existing boundaries might be erased, and a new partition of the whole be made into thirteen equal parts.

Mr. Sherman proposed, that the proportion of suffrage in the first branch should be according to the respective numbers of free inhabitants, and that in the second branch, or Senate, each State should have one vote. Dr. Franklin thought, that the numbers of representatives should bear some proportion to the represented, although he proposed proportionate supplies and an equal number of delegates from each State, the decisions to be by a majority of votes. Quotas of contribution and actual contributions of the States were proposed, and the debate was terminated at that time by the adoption in Committee of the proportion substantially as it stands at present in the Constitution; that "being the rule in the Act of Congress, agreed to by eleven States for apportioning quotas of revenue on the States." Mr. Gerry thought property not the rule of representation. Why, then, should the blacks, who were property in the South, be

in the rule of representation more than the cattle and horses of the North? — Nine States voted in favor of it; New Jersey and Delaware in the negative.

The subject was debated at length afterwards, when the representation in the Senate; — when the proportion of the representation in the first Congress under the Constitution; — and when the periodical census were, at different times, under consideration.

Gen. Pinckney dwelt on the superior wealth of the Southern States, and insisted on its having its due weight in the government. Mr. Gouverneur Morris said property ought to have its weight, but not all the weight. If the Southern States were to supply money, the Northern States were to spill their blood. Besides, the probable revenue to be expected from the Southern States had been greatly overrated. Delegates from South Carolina insisted that blacks be included in the representation equally with the whites, and moved that three fifths be struck out. It was answered that when the rule of taxation was fixed by Congress, delegates representing slave States urged that the blacks were still more inferior to freemen. To which it was replied that the Eastern States then contended for their equality. Mr King thought the admission of the blacks along with the whites at all, would excite great discontent among the States having no slaves.

Mr. Wilson did not well see on what principle the admission of blacks in the proportion of three fifths could be explained. If admitted as citizens, why not on an equality with white citizens? If as property, why is not other property admitted? These were difficulties, however, which he thought must be overruled by the necessity of compromise.

A special Committee made a report of an apportionment,

with a clause authorizing the legislature to regulate future apportionments according to the principle of wealth and numbers; and to this Gouverneur Morris moved a proviso, that taxation should be in proportion to representation. This was amended so as to read *direct* taxation. The debate was then continued upon the representation. Mr. Davie saw, that it was meant by some gentlemen to deprive the Southern States of any share of representation for their blacks. He was sure North Carolina would not confederate on any terms that did not rate them at least as three fifths. Dr. Johnson was for including blacks equally with the whites in the computation. Gouverneur Morris believed Pennsylvania would never agree upon a representation of negroes. Mr. Pinckney moved an amendment so as to make blacks equal to whites in the ratio. He said they were as productive of pecuniary resources as the laborers of the Northern States: and it would be *politic with regard to the Northern States, as taxation is to keep pace with representation.* The taxation clause was then incorporated into the clause respecting representation. Mr. Pinckney's motion for equality was rejected, two to eight, and the whole proposition adopted, six to two, Massachusetts and South Carolina divided.

The debate was continued upon the proposition for an equality of votes in the Senate. Mr. Madison said: "It seemed to be now pretty well understood that the real difference of interests lay not between the large and the small, but between the Northern and Southern States. The institution of slavery and its consequences formed the line of discrimination."

The Committee of Detail having reported a draft of the proposed Constitution, with a provision that no duties should be laid on exports, nor on the migration or importation of

such persons as the several States might think proper to admit, nor prohibit such importations; the opposition to the slave representation was renewed. When the clause respecting representation was considered, Mr. King said he never could agree to let slaves be imported without limitation, and then be represented in the national legislature. Either slaves should not be represented, or exports should be taxable. Mr. Gouverneur Morris moved to insert the word "free" before the word "inhabitants." Much, he said, would depend on this point. He denounced slavery as a nefarious institution, and the slave-trade as a defiance of the most sacred laws of humanity; and he inquired, "What is the proposed compensation to the Northern States for a sacrifice of every principle of right, every impulse of humanity?" "Let it not be said," he remarked, "that direct taxation is to be proportioned to representation. It is idle to suppose that the General Government can stretch its hand directly into the pockets of the people scattered over so vast a country. They can only do it through the medium of exports, imports, and excises."

Mr. Dayton seconded the motion.

Mr. Sherman "did not regard the admission of negroes as liable to such insuperable objection. It was *the freemen of the Southern States who were to be represented, according to the taxes paid by them, and the negroes* are *only included in the estimate of the taxes.*"

Mr. Wilson thought the motion premature. An agreement to the clause under consideration would be no bar to the object of it; and it was rejected, New Jersey alone voting for it.

Subsequently, Mr. Dickinson moved to limit the number of representatives to be allowed to the large States. Unless this were done, the small States would be reduced to entire

insignificance, and encouragement given to the importation of slaves. And when the clause of the draft providing that no duties should be laid on the importation of slaves, nor the importation prohibited, came up, the increase of the inequality in the representation by means of the slave-trade, if the three fifths clause was allowed, was not overlooked. Mr. Luther Martin (of Maryland) proposed to allow a prohibition or tax on the importation of slaves. "In the first place," he said, "as five slaves are to be counted as three freemen in the apportionment of representation, such a clause would leave an encouragement to this traffic. In the second place, slaves weakened one part of the Union, which the other parts were bound to protect; the privilege of importing them was therefore unreasonable. And in the third place, it was inconsistent with the principles of the Revolution, and dishonorable to the American character, to have such a feature in the Constitution."

Delegates from North Carolina, South Carolina, and Georgia insisted, that those States would never agree to the plan unless their right to import slaves was untouched. Some of them intimated that if they were let alone, they would probably of themselves stop importations. Mr. Rutledge said, if the Northern States consult their interest, they will not oppose the increase of slaves, which will increase the commodities of which they will become carriers.

The subject was referred to a committee, which reported a clause restraining any prohibition of migration or importation prior to 1800, and that a tax or duty might be imposed upon such migration or importation, at a rate not exceeding the average of the duties laid on imports. Upon motion of General Pinckney, opposed by Mr. Madison, the first part of the report was amended so as to extend the term to 1808;

and the second part of it was then amended so that the tax or duty should not exceed ten dollars. Mr. Sherman was against this second part, as acknowledging men to be property, by taxing them as such under the character of slaves. Mr. King and Mr. Langdon considered this as the price of the first part, and General Pinckney admitted that it was so. Virginia was decidedly in favor of an immediate restriction.

I have thus presented an extended, and yet very limited, sketch of the debates and proceedings, that you may see how the slave-holding States relieved themselves, in the Congress of the Confederation, from taxation, (or what was in the nature of taxation,) on account of their slaves, by transferring the basis from population to that of real estate; and how, when the latter basis failed, by reason of a neglect to make returns, and there was a report of a committee in favor substantially of the former basis, — by proposing that two slaves should be counted as one freeman, and alleging that the labor of slaves was not of as much value as that of freemen by about that ratio, they succeeded in reducing the slave portion of the basis of taxation to three fifths, by a compromise; — how, in the Convention which formed the Constitution, by insisting that there should be a representation on account of slaves, because wealth or property was a proper subject of representation, and alleging that the labor of a slave was of the value or nearly the value of that of a freeman, they succeeded in obtaining a representation on three fifths of their slaves, by another compromise, upon which, direct taxation and representation were to go together, the taxation being the equivalent or consideration, mainly, which was to satisfy the non-slave-holding States for the inequality; and how, afterwards, by insisting on an unre-

stricted right to import slaves, threatening something like secession or disunion if that demand was not acceded to, they obtained a provision prohibiting restriction for twenty years, subject to a duty, by another compromise.

The slave-holding portion of the basis of representation was evidently very distasteful to some of the members, even sugar-coated as it was by taxation on the same basis; and it was undoubtedly rendered somewhat more palatable by the insertion of the provision by which Congress might prohibit the importation of slaves after 1808, and thus far restrain the extension of the inequality, while at the same time it prevented a further "defiance of the most sacred laws of humanity."

In the Convention of Massachusetts for the ratification of the Constitution, Mr. King, explaining the section respecting representation, is reported to have said, "It is a principle of this Constitution that representation and taxation should go hand in hand. This paragraph states that the number of free persons, including those bound to service for a term of years, and including Indians not taxed, three fifths of all other persons. These persons are the slaves. By this rule are representation and taxation to be apportioned. And it was adopted because it was the language of all America." And to make the idea of taxation by numbers more intelligible, he said, "five negro children of South Carolina are to pay as much tax as the three governors of New Hampshire, Massachusetts, and Connecticut." Another member (Mr. Nasson) wished "the honorable gentleman had considered this question on the other side, as it would then appear that this State will pay as great a tax for three children in the cradle, as any of the Southern States will for five hearty working negro men."

In answer to a suggestion that Congress may draw their revenue wholly by direct taxes, it was said, "They cannot be induced to do so; it is easier for them to have resort to the impost and excise; but it will not do to overburden the impost, because that would promote smuggling, and be dangerous to the revenue; therefore Congress should have the power of applying, in extraordinary cases, to direct taxation."

One of the speakers in the Convention at Boston, is reported to have said:—

"There is another matter concerning which we hear a great deal in these days of excitement,—and, allow me to say, a great deal which, in my judgment, is mischievous. Men who have accustomed themselves to speak without reverence to the Constitution of their country, which no man who is fit for a Republican can, are constantly attempting to make us believe that the provision of the Constitution which determines the representation in the House of Representatives, is a grant of enhanced power to the slave States over that which is accorded in the council of the nation to the free States. And those repeated attempts are not always in vain, and there are many good men and true who really believe it. Now, what is the provision concerning which all this hue and cry is made, and on account of the existence of which these designing men are endeavoring to make us believe that the Constitution has established an oligarchy in the South? Here it is:

"'Representatives and direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.'

"This is the whole provision, and many men having this alone presented to them, think that the addition to the enumeration of three fifths of the slaves, is a grant of increased power to the slave State. But he who will examine the whole of the Constitution, in all those parts which have reference to representation from the several States, will see that, instead of being a grant, it is a limitation of power.

"Strike this 'obnoxious' provision out, and see what would be the effect of that insane proceeding. The immediate and the only effect would be,

that the slave States would be entitled to and would have more representatives than they now have, while the free States would have less than they now have. Is that what these philanthropic gentlemen want?

"The Constitution provides, — and I suppose that we shall all agree that it ought to provide, — that representation should be based upon population. Strike out the 'oligarchical provision,' as I have heard it called, and the enumeration in the slave States would include not only three fifths, but the whole of the slave population.'

On reading this, I was very much at a loss to understand wherein the misrepresentation consisted, and how, if the provision cited were struck out, the Constitution would provide that representation should be based upon population. A friend suggested that the meaning must be, that if that part of the provision which gives the representation for three fifths of the slaves, which is the "obnoxious" or "oligarchical provision," were struck out, such would be the result. But that would not give a representation upon the whole number of slaves, for in that case the numbers upon which the representation is to be apportioned, would be determined by the whole number of free persons, including those bound to service, and excluding Indians not taxed. If the whole clause respecting the mode in which the numbers are to be determined was struck out, the Constitution would be a different thing from what it is, — which would be true, in fact, if you strike out the whole, or any substantial part, of the provision. What it would have been, if not what it is, no one can say. It is very clear, however, from the debates, that it would not have contained a clause by which the whole number of slaves would be included in the ratio of representation. The position, therefore, that an increased representation, and an unequal representation, is granted to the slave States, seems not to be impeached by this argument.

I need not say to you that, under this provision of the Constitution, taxation and representation have not gone "hand in hand," — no substantial equivalent having been received for the inequality of the representation. The clause, so far as respects representation, has been always active and operative, and the inequality is constantly increasing; but as it regards taxation it has been almost a dead letter, quite so for more than a third of a century, there having been no direct taxation during that time.

Whether the basis be regarded as one founded upon population, or property, there is an inequality which is contrary to the spirit of our free institutions.

The inequality exists also in the election of President and Vice-President. At the coming election, the slave-holding States will have twenty-one electoral votes, by reason of their slave population; the Constitution providing that "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress." But for this unequal vote, Mr. Buchanan's chance would be the mere shadow of a shade.

But this inequality is not a subject of complaint, with any view to redress or change. The people of the non-slave-holding States ratified the Constitution, with these provisions as parts of it. If they made a bad compromise, it is no more than they have done in other instances. Let it stand. Let those entitled have the benefit of it; but it is proper that these matters should be brought into view, when the account of the wrongs and injustice done to the slave-holding States is audited for the purpose of ascertaining the balance. There is no design on the part of the Republican party, so far as I

am aware, to attempt an escape from the due operation of these constitutional provisions.

But the inquiry arises, What is the extent and limit of this constitutional provision authorizing a representation based upon three fifths of the slave population? This is a question upon which I proceed to speak, and but for which I should not be here.

The question is, whether all the States now in the Union, and those which may be admitted hereafter, are entitled by this constitutional provision to a representation based upon three fifths of their slaves? or whether, in its legitimate operation, it is confined to States formed out of territory embraced within the limits of the United States at the time the Constitution was adopted? If the latter, then two of the twenty-one representatives from the slave-holding States, who have their seats upon that part of the basis, are not there in pursuance of the Constitution, but upon some other foundation; and any other States which may hereafter be formed from the territory acquired or annexed since the adoption of the Constitution, will not be entitled to this unequal representation, even if they are slave States. If this be true, two electoral votes, which will probably be cast in the pending election, (one in Louisiana, derived entirely from her slave population, and one in Missouri, derived from her slave population, and a fraction of the free population too small to have given her a representative, but for the aid of the slave basis,) will be cast by reason of the unequal and wrongful representation from those States; and will be, therefore, of themselves, so far as they may affect the election, a political injustice. And if all this be so, then the Republican oppo-

sition to the extension of slavery, as the most effectual way of preventing further injustice, which it may not be easy to escape if the extension is permitted, is neither sectional nor fanatical, but is founded upon the Constitution itself.

There is something in the history of the debates upon the Constitution, which might tend to show that this provision might have been confined to those States which were in existence when the Constitution was formed, through a power to annex a condition to the admission of any new slave State by which it should be entitled to representation upon its free population alone. A provision reported by the Committee of Detail, in connection with the clause authorizing the admission of new States, in these words, "If the admission be consented to, the new State shall be admitted on the same terms with the original States," was struck out by nine votes to two, for the reason expressed, that circumstances might arise which would render it inconvenient to admit new States on terms of equality, and that the legislature should be left free.

It is not necessary, however, that I should now rely upon that, in order to sustain my position. I am willing to concede, for the sake of the argument, that this provision respecting representation embraces all States which might lawfully be included in the Union, in pursuance of the provisions of the Constitution, as understood by the framers of it, and construed by those best qualified to determine its scope and meaning; and more than this cannot be required. It would be subversive of the first principles of law to extend the compromise respecting representation beyond the constitutional limits for the admission of States into the Union. For instance, suppose the Constitution had provided that the States mentioned in it, with Vermont and the five States to

be formed north-west of the Ohio, might be included in the Union, but that no State should be divided, and that no other State should be admitted; then the provision respecting representation would regulate the proportion of all the States which might thus be included, but could not lawfully and fairly be construed to extend farther. And if, contrary to the supposed provision respecting the admission of States, a foreign State should be admitted into the Union by a major vote of Congress, or by treaty, or in any other way except an amendment of the Constitution, the State so admitted would not be within the constitutional provision respecting representation, but must depend for her representation in the national councils upon some other authority than the Constitution.

We come, then, to the question, What States might be admitted into the Union, as formed by the Constitution, under and according to the provisions of that instrument?

Although Rhode Island refused to send delegates to the Convention, the Constitution made provision for her as if she had been represented. The original thirteen States, therefore, were entitled to membership, and the ratification of nine of them was sufficient for its establishment among the States so ratifying. The third section of the fourth article is in these words: —

"New States may be admitted by the Congress into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress."

It may be said that this language is broad enough to include the admission of all the globe; but it is quite clear that

such could not have been the intent of those who framed or of those who adopted it; and the well-settled rule of construction, applicable to organic as well as other laws, is, that in determining the meaning, the context, subject-matter, spirit, and reason of the law, are to be taken into consideration. New States may be admitted. What new States? We understand from other parts of the Constitution, that a State, to be admitted, must have a republican form of government. Here is one qualification of the general terms not contained in the section itself. If we turn to the introductory clause or preamble of the Constitution, we find not only by whom, but for what purposes, the Constitution was framed. "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." This looks very much like another qualification. The United States then existed as a nation, with limits defined by the treaty of peace. It was not established to form a more perfect union with the inhabitants of Great Britain, or those of any other foreign State and their posterity; and if not, the provision for admission is not broad enough to embrace them. All those for whom it was framed may be included. Those for whom it was not framed are not within the clause of admission. The argument, however, does not rest on that alone. Fortunately the means for determining this question are accessible; but the inquiry may embrace a few facts in the previous history of the country. When the colonial charters were granted, the knowledge of the geography of this country was very limited, and perhaps there were other reasons for the extent of some

of the grants. Connecticut, Carolina, and Georgia extended west to the South Sea, and Virginia extended from sea to sea west and north-west. Upon the Declaration of Independence, the new States claimed according to the colonial charters. The treaty of peace was made with "the United States" in 1783, and specified their boundaries, the westerly line being the middle of the Mississippi; and of course the limits of the States on that side were defined by that boundary. Nearly all the country west of the mountains was at that time a wilderness, and the land in possession of the Indians, but the several States claimed the portion of it which was within their charter limits. Other States having no vacant lands, insisted that these uninhabited lands, having been acquired by the common means and common expenditure of blood and treasure, ought to belong to all, and be applied to the discharge of the debt incurred by the war. Maryland declined to ratify the Articles of Confederation for a long period, the principal reason being that the lands were not thus appropriated. In 1780, New York passed an act which was completed in March, 1781, by a formal instrument executed by her delegates in Congress, defining her limits, and ceding to the use and benefit of such States as should become parties to the Confederation, all her claims northward and westward of those limits.

In 1783, Virginia authorized a conveyance to the United States in Congress assembled of all her right to the territory northwest of the Ohio, which was perfected in 1784, by a transfer of all her right, title, and claim, as well of soil as of jurisdiction. With the exception of certain lands reserved, this cession was to the same uses as that of New York. The act contained a condition that the territory so ceded should be formed into States containing a suitable extent of terri-

tory, not less than one hundred, nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit; and that the States so formed shall be distinct republican States, and admitted members of the Federal Union, having the same rights of sovereignty, freedom, and independence as the other States."

In 1785, Massachusetts made a cession of certain of her claims. And in 1786, Connecticut did likewise.

At the time of the formation of the Constitution, Vermont was desirous of admission into the Union, which was opposed by New York, on account of her claim to the territory claimed by Vermont.

As early as 1782 a petition from Kentucky asserted the right of Congress to create new States, and prayed that the power might be asserted in their behalf; and some measures had been taken by Virginia with a view to the erection of a separate State west of the mountains.

There had been a petition likewise from inhabitants of Western Pennsylvania, complaining of grievances, and praying that Congress would give a sanction to their independence, and admit them into the Union.

The people of the District of Maine had contemplated a separate government; and the erection of another in Western North Carolina was foreseen.

It was under these circumstances that the question came up in the Convention, what provision should be made in the Constitution relative to the admission of new States.

The 10th article of the plan proposed by Mr. Randolph was a resolution, "that provision ought to be made for the admission of States *lawfully arising within the limits of the United States*, whether from a voluntary junction of territory

or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

This resolution was agreed to, and was afterwards incorporated into a report of a Committee on Resolutions. The report, with this resolution in the same words, was afterwards referred to the Committee of Detail.

Thus far this matter had formed the subject of little or no debate.

In the course of the discussions upon representation, " Mr. Gerry wished before the question should be put that the attention of the House might be turned to the dangers apprehended from Western States. He was for admitting them on liberal terms, but not for putting ourselves into their hands. They will, if they acquire power, like all men, abuse it. They will oppress commerce, and drain our wealth into the Western country. To guard against these consequences, he thought it necessary to limit the number of new States to be admitted into the Union, in such a manner that they should never be able to outnumber the Atlantic States." He accordingly moved, "that in order to secure the liberties of the States already confederated, the number of Representatives in the first branch, of the States which shall hereafter be established, shall never exceed in number the Representatives from such of the States as shall accede to this Confederation."

Mr. King seconded the motion. Mr. Sherman thought there was no probability that the number of future States would exceed that of the existing States. If the event should ever happen, it was too remote to be taken into consideration at that time. Besides, we are providing for our posterity, for our children and our grandchildren, who would

be as likely to be citizens of new Western States as of the old States. On this consideration alone, we ought to make no such discrimination as was proposed by the motion."

In the Report of the Committee of Detail, the plan as matured at that time was introduced in these words, namely: — "We the people of the States of New Hampshire, Massachusetts, &c. (reciting the names of the thirteen States) do ordain, declare, and establish the following Constitution for the government of ourselves and our posterity."

The 17th article of the plan was: — "New States, lawfully constituted or established *within the limits of the United States*, may be admitted by the legislature into this government; but to such admission the consent of two thirds of the members present in each House shall be necessary. If a new State shall arise within the limits of any of the present States, the consent of the legislatures of such States shall also be necessary to its admission. If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the legislature may make conditions with the new States concerning the public debt which shall then be subsisting."

When this article was taken up for consideration, a long debate arose, and divers amendments were proposed.

Mr. Gouverneur Morris moved to strike out the last two sentences, namely: — "*If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the legislature may make conditions with the new States concerning the public debt which shall be then subsisting.*" He did not wish to bind down the legislature to admit Western States on the terms here stated.

Mr. Madison opposed the motion, insisting that the Western States neither would nor ought to submit to a union

which degraded them from an equal rank with the other States.

Col. Mason. If it were possible by just means to prevent emigration to *the Western country*, it might be good policy; but go the people will, as they find it for their interest; and the best policy is to treat them with that equality which will make them friends and not enemies.

Mr. Gouverneur Morris did not mean to discourage the growth of the Western country. He knew that to be impossible. He did not wish, however, to throw power into their hands.

Mr. Sherman was for fixing an equality of privileges.

Mr. Langdon was in favor of the motion. He did not know but circumstances might arise which would render it inconvenient to admit new States on terms of equality.

Mr. Williamson was for leaving the legislature free. The existing *small* States enjoy an equality now, and for *that* reason are admitted to it in the Senate. This reason is not applicable to new Western States.

On Mr. Gouverneur Morris's motion for striking out, New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, and Georgia aye, — nine; Maryland and Virginia no, — two.

After Mr. Morris's amendment striking out the provision for equality had prevailed, he moved as a substitute for the residue of the article, "New States may be admitted by the legislature into the Union; but no new State shall be erected within the limits of any of the present States, without the consent of the legislature of such State, as well as the general legislature." The first part to "Union," was agreed to *nem. con.* Mr. L. Martin opposed the latter part. "Nothing," he said, "would so alarm the limited States, as to make the

consent of the larger States, claiming the Western lands, necessary to the establishment of new States within their limits." The motion was agreed to, six to five. The article coming before the House as amended, Mr. Sherman thought it unnecessary. The Union could not dismember a State without its consent.

Dr. Johnson suggested, that as the clause stood, Vermont would be subjected to New York, contrary to the faith pledged by Congress.

Mr. Sherman moved to postpone, to take up this amendment, and moved as an amendment, " The legislature shall have power to admit other States into the Union; and new States to be formed by the division or junction of States now in the Union, with the consent of the legislature of such States." Mr. Madison adds, [" *The first part was meant for Vermont, to secure its admission,*"] which shows clearly that the general language used did not refer to foreign territory; as is shown in fact by the whole of the debate.

Mr. Gouverneur Morris's substitute, after being amended, was agreed to, 8 to 3, — New Jersey, Delaware, Maryland in the negative.

An amendment by Mr. Dickinson was adopted without count, and the article was thus framed substantially as it now stands in Art. IV. sect. 3 of the Constitution, " Congress " being substituted for " legislature," with some change in the arrangement of the sentence.

In all this long debate, and among the various propositions to amend, I find nothing indicating a supposition on the part of any member, that provision was to be made for the admission of a State formed from territory not then within the limits of the United States. The general clause providing that new States may be admitted into the Union, passed, as

we have seen, without dissent, which it could not have done had there been a supposition that it contemplated the possibility of the addition of foreign territory. That was intended to provide for the admission of Vermont, and perhaps to cover the admission of the States to be formed from the territory northwest of the Ohio, although it would seem to have been understood that the ordinance adopted by Congress July 13, 1787, (about six weeks prior to these proceedings in the Convention,) had settled the affairs of that territory by a fundamental law and compact, so that no provision in the Constitution was necessary in reference to that territory. The residue of the article related to cases of new States to be formed from the territory of the existing States, by division, and perhaps by the junction of parts of States, — a main part of the controversy being, whether Congress should have power to do this without the consent of the States to be affected. No mention was made of Canada, for whose admission into the Confederation provision was made in the Articles of Confederation. It was quite proper to give her an opportunity to join in the Revolution. As she had not done so, the Constitution was not made for her.

It appears that the provision for the admission of new States, extended only to the territory then embraced in the United States; not only from the preamble, but because it was framed with reference to the existing state of things; because all its language is satisfied without extending it to foreign territory; because it would have been regarded as indecorous, if not hostile, toward Great Britain and Spain, had provision been made for a contingent admission, founded on anticipated dismemberments of their territory; because Canada, for the admission of which provision was made in the Articles of Confederation, is left out; because the debates

show conclusively that no foreign territory was within the contemplation of the Convention, — and it is believed that no suggestion of a construction which would include such territory, is to be found in the debates in the State conventions; and because any provision for admitting foreign territory would have been fatal to the Constitution. No one conversant with the history of the Constitution can doubt it. The jealousy of the Western States which were to be admitted shows this.

But this is not all upon this point. The construction of the Constitution nearest to a contemporaneous one, clearly held the provision not to extend to foreign territory.

Upon the adoption of the Constitution, the settlement of the Western country was more rapid, and the importance of the navigation of the Mississippi became more and more apparent.

An arrangement was had with Spain respecting the navigation through her territory, and for a deposit of merchandise at New Orleans.

Difficulties, and jealousy, and excitement arose, and there was a proclamation by the Intendant at New Orleans, that the right of deposit no longer existed; whether with or without the direction of his government is now immaterial.

Spain about that time ceded Louisiana to France by the treaty of St. Ildefonso, and a negotiation was opened with France for the purchase of the Island of Orleans and the territory eastward.

Mr. Madison, then Secretary of State, sent to Mr. Livingston, our minister to France, the project of a treaty, the 7th article of which is as follows: —

"Art. 7. To incorporate the inhabitants of the hereby ceded territory

with the citizens of the United States on an equal footing, being a provision which cannot now be made, it is to be expected from the character and policy of the United States that such incorporation will take place without unnecessary delay. In the mean time they shall be secure in their persons and property, and in the enjoyment of their religion."

While this matter was under consideration, the danger of a war between France and England became imminent; and Bonaparte, probably convinced that he could not hold Louisiana if war was declared, proposed to sell the whole of it, and no less.

Mr. Livingston, and Mr. Monroe who joined him about that time, were not authorized to make such a purchase. But the matter admitted of no delay; an answer to the proposition must be given forthwith; and they took the responsibility, and negotiated a treaty, April 30, 1803, for the purchase, which contained this as its third article, namely: —

"Art. 3. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

The article, it is perceived, is somewhat more definite than that contained in Mr. Madison's draft of a treaty for the smaller cession. It is not, perhaps, to be inferred with certainty from the article prepared by Mr. Madison, that he entertained a decided opinion that Louisiana could not be admitted into the Union as a State without an amendment of the Constitution; but upon the conclusion of the treaty, Mr. Jefferson's opinion to that effect was distinctly ex-

pressed. In a letter to Wilson C. Nicholas, Sept. 7, 1803, he said: —

"Whatever Congress shall think it necessary to do, should be done with as little debate as possible, and particularly so far as respects the constitutional difficulty. I am aware of the force of the observations you make on the power given by the Constitution to Congress, to admit new States into the Union, without restraining the subject to the territory then constituting the United States. But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I cannot help believing the intention was not to permit Congress to admit into the Union new States, which should be formed out of the territory for which, and under whose authority alone, they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, &c. into it, which would be the case on your construction. When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. . . . . I confess, then, I think it important, in the present case, to set an example against broad construction, by appealing for new power to the people. If, however, our friends shall think differently, certainly I shall acquiesce with satisfaction; confiding, that the good sense of our country will correct the evil of construction when it shall produce ill effects."

Other letters written by him are to the same effect.

The treaty was ratified by the Senate, at a special session of Congress, Oct. 20, 1803. The ratification was in executive session, and I have found no sketch of the debate. The

subject came before the Senate soon after, on a bill to authorize a creation of stock, for the purpose of carrying the treaty into effect. A few extracts from that debate will show the opinion upon this subject.

Mr. Pickering said: —

"Neither the President and Senate, nor the President and Congress, are competent to such an act of incorporation. He believed that our administration admitted that this incorporation could not be effected without an amendment of the Constitution; and he conceived that this necessary amendment could not be made in the ordinary mode by the concurrence of two thirds of both Houses of Congress, and the ratification by the legislatures of three fourths of the several States. He believed the assent of each individual State to be necessary for the admission of a foreign country as an associate in the Union; in like manner as in a commercial house, the consent of each member would be necessary to admit a new partner into the company; and whether the assent of every State to such an indispensable amendment were attainable, was uncertain."

Mr. Tracy: —

"Congress have no power to admit new foreign States into the Union, without the consent of the old partners. The article of the Constitution, if any person will take the trouble to examine it, refers to domestic States only, and not at all to foreign States; and it is unreasonable to suppose that Congress should, by a majority only, admit new foreign States, and swallow up, by it, the old partners, when two thirds of all the members are made requisite for the least alteration in the Constitution. The words of the Constitution are completely satisfied, by a construction which shall include only the admission of domestic States, who were all parties to the Revolutionary war, and to the compact; and the spirit of the association seems to embrace no other. . . . .

"But it is said, that this third article of the treaty only promises an introduction of the inhabitants of Louisiana into this Union, as soon as the principles of the federal government will admit; and that, if it is unconstitutional, it is void; and, in that case, we ought to carry into effect the constitutional part. . . . .

"I shall be asked, sir, what can be done? To this question I have two answers; one is, that nothing unconstitutional can or ought to be done; and if it be ever so desirable that we acquire foreign States, and the navigation of the Mississippi, &c., no excuse can be formed for violating the Constitution; and if all those desirable effects cannot take place without violating it, they must be given up. But another and more satisfactory answer can be given. I have no doubt but we can obtain territory either by conquest or compact, and hold it, even all Louisiana, and a thousand times more if you please, without violating the Constitution. We can hold territory; but to admit the inhabitants into the Union, to make citizens of them, and States, by treaty, we cannot constitutionally do; and no subsequent act of legislation, or even ordinary amendment to our Constitution, can legalize such measures. If done at all, they must be done by universal consent of all the States or partners to our political association. And this universal consent, I am positive, can never be obtained to such a pernicious measure as the admission of Louisiana, of a world, and such a world, into our Union. This would be absorbing the Northern States, and rendering them as insignificant in the Union as they ought to be, if, by their own consent, the measure should be adopted."

Mr. John Quincy Adams: —

"For my own part, I am free to confess that the third article, and more especially the seventh, contain engagements placing us in a dilemma, from which I see no possible mode of extricating ourselves but by an amendment, or rather an addition to the Constitution. The gentleman from Connecticut (Mr. Tracy), both on a former occasion, and in this day's debate, appears to me to have shown this to demonstration. But what is this more than saying that the President and Senate have bound the nation to engagements which require the coöperation of more extensive powers than theirs, to carry them into execution? Nothing is more common in the negotiations between nation and nation, than for a minister to agree to and sign articles beyond the extent of his powers. This is what your ministers, in the very case before you, have confessedly done. It is well known that their powers did not authorize them to conclude this treaty; but they acted for the benefit of their country; and this House, by a large majority, has advised to the ratification of their proceedings."

Mr. Taylor, of North Carolina, who was in favor of the treaty, said: —

"The territory is ceded by the first article of the treaty. It will no longer be denied that the United States may constitutionally acquire territory. The third article declares that 'the inhabitants of the ceded territory shall be incorporated in the Union of the United States.' And these words are said to require the territory to be erected into a State. This they do not express, and the words are literally satisfied by incorporating them into the Union as a territory, and not as a State. The Constitution recognizes, and the practice warrants, an incorporation of a territory and its inhabitants into the Union, without admitting either as a State."

Mr. Breckenridge, of Kentucky, who also supported the treaty: —

"But if gentlemen are not satisfied with any of the expositions which have been given of the third article of the treaty, is there not one way, at least, by which this territory can be held? Cannot the Constitution be so amended, (if it should be necessary,) as to embrace this territory? If the authority to acquire foreign territory be not included in the treaty-making power, it remains with the people; and in that way all the doubts and difficulties of gentlemen may be completely removed; and that, too, without affording France the smallest ground of exception to the literal execution on our part of that article of the treaty."

Mr. Wilson C. Nicholas, of Virginia, to whom the letter of Mr. Jefferson was addressed, did not venture, against the opinion there expressed, to contend that Louisiana could be admitted as a State, without an amendment of the Constitution. He said: —

"If, as some gentlemen suppose, Congress possesses this power, they are free to exercise it in the manner that they may think most conducive to the public good. If it can only be done by an amendment to the Constitution, it is a matter of discretion with the States whether they will do it or not;

for it cannot be done 'according to the principles of the federal Constitution,' if the Congress or the States are deprived of that discretion which is given to the first, and secured to the last by the Constitution. In the third section of the fourth article of the Constitution, it is said, 'new States may be admitted by the Congress into this Union.' If Congress have the power, it is derived from this source; for there are no other words in the Constitution that can, by any construction that can be given to them, be considered as conveying this power. If Congress have not this power, the constitutional mode would be by an amendment to the Constitution."

The treaty had been the subject of a debate in the House, a few days before. The constitutional right to acquire territory by purchase, was more strenuously questioned in the House than in the Senate. The right to admit territory, if acquired, was also denied.

Mr. Griswold, of New York, said:—

"It was not consistent with the spirit of the Constitution that territory other than that attached to the United States at the time of the adoption of the Constitution should be admitted; because at that time the persons who formed the Constitution of the United States had a particular respect to the then subsisting territory. They carried their ideas to the time when there might be an extended population; but they did not carry them forward to the time when addition might be made to the Union of a territory equal to the whole United States, which additional territory might overbalance the existing territory, and thereby the rights of the present citizens of the United States be swallowed up and lost. Such a measure could not be consistent either with the spirit or the genius of the government."

Mr. Griswold, of Connecticut:—

"The government of the United States was not formed for the purpose of distributing its principles and advantages to foreign nations. It was formed with the sole view of securing those blessings to ourselves and our posterity. It follows from these principles that no power can reside in any

public functionary to contract any engagement, or to pursue any measure, which shall change the Union of the States. . . . .

"A new territory and new subjects may undoubtedly be obtained by conquest and by purchase; but neither the conquest nor the purchase can incorporate them into the Union. They must remain in the condition of colonies, and be governed accordingly. The objection to the third article is not that the province of Louisiana could not have been purchased, but that neither this nor any other foreign nation can be incorporated into the Union by treaty or by law; and as this country has been ceded to the United States only under the condition of an incorporation, it results that, if the condition is unconstitutional or impossible, the cession itself falls to the ground."

On the other hand, Mr. Smilie, of Pennsylvania, after citing the article, added: —

"Now, where is the difficulty? We are obliged to admit the inhabitants according to the principles of the Constitution. Suppose those principles forbid their admission; then we are not obliged to admit them. This followed as an absolute consequence from the premises. There existed, however, a remedy for this case, if it should occur: for, if the prevailing opinion shall be, that the inhabitants of the ceded territory cannot be admitted under the Constitution as it now stands, the people of the United States can, if they see fit, apply a remedy, by amending the Constitution so as to authorize their admission. And if they do not choose to do this, the inhabitants may remain in a colonial state."

Mr. Nicholson, of Maryland: —

"Whether the United States, as a sovereign and independent empire, had a right to acquire territory, was one question, but whether they could admit that territory into the Union, upon an equal footing with the other States, was a question of a very different nature. Upon this latter point, he meant to offer no opinion, because he did not consider it before the House. When the subject should come properly into discussion, he should have no objection not only to enter at large into the constitutional authority to admit the newly acquired territory into the Union as a State, but likewise to inquire whether this was really the spirit and intention of the third article of the treaty? The question now before the committee was, Is it expedient to carry this treaty into effect?

Mr. Rodney, of Delaware: —

"How are these people to be admitted? According to the principles of the federal Constitution. Is it an open violation of any part of the Constitution? No. An express reservation is made by those who formed the treaty, that they must be admitted under the Constitution. Now, if admitted agreeably to the Constitution, it cannot be said to be in violation of it, and if not in violation of it, the fears of gentlemen are groundless."

Mr. John Randolph: —

"A stipulation to incorporate the ceded country does not imply that we are bound ever to admit them to the unqualified enjoyment of the privileges of citizenship. It is a covenant to incorporate them into our Union — not on the footing of the original States, or of States created under the Constitution — but to extend to them, according to the principles of the Constitution, the rights and immunities of citizens, being those rights and immunities of jury trial, liberty of conscience, &c., which every citizen may challenge, whether he be a citizen of an individual State, or of a territory subordinate to and dependent on those States in their corporate capacity. In the mean time they are to be protected in the enjoyment of their existing rights. There is no stipulation, however, that they shall ever be formed into one or more States."

I have thus cited that part of the debates upon this subject in the Senate and House which bears directly upon this question, for the purpose of showing, that while the right to admit a State formed out of foreign territory was emphatically denied, no one attempted to controvert those arguments by asserting the existence of a constitutional power; but the argument was evaded by contending that the third article of the treaty did not stipulate for any admission as a State. It is true that it may be inferred, from the remarks of one or two of the friends of the administration, that personally they were ready to assert that the territory acquired

could be admitted, but the argument was suffered to go by default.

Upon the question, very much discussed in the preceding debate, whether the United States possessed a constitutional power to acquire territory by purchase, permit me to say that I have no doubt that such a power exists in certain cases as an incident to the powers expressly granted. The right to make war may involve a right of conquest as an incident. It does not follow that the subject-matter of the conquest is to become one of the States of the Union. Nor is it by any means to be concluded, that because the United States may acquire territory by conquest, they may acquire it by purchase in any and every case and for every purpose. The United States have no right to purchase territory merely for sale again. But the purchase may be made as an incident to the power to regulate commerce, embracing the power to provide for the necessities of commerce. On this principle, the arrangement with Spain was lawful; and a purchase for the purpose of the free navigation of the river, and for a place of deposit and transhipment, was within the just constitutional powers of the government. If this could not be effected without the purchase of the whole of Louisiana, I do not doubt the right to acquire that territory, and then to sell any part of it which was not necessary for the purpose for which it was required, or to retain it as a territory. But all that is far from proving a right on the part of Congress to admit any portion of it as a State.

Along with the right to acquire territory is the right to govern it. I shall not detain you with an argument to show this. It results as a necessity almost; as a right, certainly, proved upon sound principles, and shown by a uniform prac-

tice of this government up to the present time; not even abandoned at the present day.

Nor shall I stop to show that the stipulation in the treaty, that the inhabitants of the ceded territory should be incorporated into the Union, had no relation to those parts of the territory in which at the time there were no civilized inhabitants, and gave no rights to their future inhabitants. France had no intention and could have no desire to provide for the comfort and security of persons who, half a century afterwards, should emigrate from the States and settle in the unsettled portion of the country which she ceded. It was very clearly shown in the debate in 1803 that the treaty-making power could not stipulate for the admission of a State, so as to require its admission. But if it could, the third article of the treaty did not extend to the "howling wilderness," nor does the fact that slaves then existed in Louisiana show any right now to hold them in Kansas.

The question whether a State formed out of territory acquired since the adoption of the Constitution, could be admitted by Congress, came before that body again in 1810–11, on the application of Louisiana for admission. — Notwithstanding the opinions of Mr. Jefferson and others, the dominant party did not see fit to propose an amendment of the Constitution.

The success of the application was a foregone conclusion, but the minority were not willing to yield a constitutional principle without an attempt to maintain it; and the friends of the measure were therefore compelled to contend for the power. The attempt to maintain the doctrine even at that late day, and under such circumstances, is to have its full weight. Unfortunately for the argument, however, the rea-

sons given tend either to prove nothing, or to prove the converse of the proposition which they are adduced to support.

Mr. Rhea, of Tennessee: —

"We have been told by that gentleman that though States may be admitted into the Union, no territory which did not belong to the original States can be admitted to be a State. I, said Mr. R., do solemnly protest against this doctrine, and do deny its constitutionality. It is with States as with individuals; if an individual, the head of a family, purchases a farm adjoining that on which he lives and resides, and probably (?) acquires all the right and title thereto, will any one deny it to be his? Will any one say that he has not power to incorporate it with his former farm, so that both shall be one, or in other words, that purchased with the other shall be but one? It is believed no one will say so. The purchaser, Sir, can do more; he can place his son or sons thereon, and although so placed, and out of their father's house, they will remain belonging to the family. The United States, a sovereign, have power to purchase adjacent territory."

The Honorable gentleman failed to remember that the owner of a farm is not created by a written constitution for certain limited purposes.

Mr. Gholson, of Virginia: —

"In this delegation of power I can perceive nothing to warrant the inference that it is confined to such territory only as the United States then possessed, or that it excludes the incorporation into the Union of subsequent acquisitions. Indeed this is altogether a novel doctrine, and all the interpretations of the Constitution have been contrary to it. Upon examination, I presume it would prove too much even for its advocate. For if the construction insisted on would exclude Orleans from the Union, it would likewise exclude the Mississippi Territory, since the latter as well as the former was acquired by the United States posterior to the adoption of the Constitution; and the gentleman has not applied his doctrine to the Mississippi Territory; nor will it, I imagine, be attempted to be shown that the Mississippi is to be

shut out of the Union, contrary to our engagements to Georgia, when she ceded to the United States that territory."

But Georgia was within the limits of the United States, and the territory ceded by her therefore not foreign territory.

Mr. R. M. Johnson, of Kentucky, after reciting the third article of the treaty: —

"We are thus solemnly bound by compact to admit this Territory into the Union as a State, as soon as possible, consistent with the Constitution of the United States. What principle of the Constitution will be violated by their admission into the Union as a State? In fact, we are bound by the principles of the Constitution; we are bound to the people of the United States; we are bound by conscience, and we are bound by a still more sacred tie to Him who gave us independence, to extend the blessings of liberty to these people whenever it is practicable."

Mr. Macon, as cited by Mr. Quincy, said: —

"If this article had not territories without the limits of the old United States to act upon, it would be wholly without meaning. Because the ordinance of the old Congress had secured the right to the States within the old United States, and a provision for that object, in the new Constitution, was wholly unnecessary."

Mr. Bibb cited the first part of the clause, "New States may be admitted into the Union," and said there was a general power granted, and what followed showed two limitations upon it, and, according to his rule, "the expression of these two excluded all idea of any other." — Whereas, in truth, the limitations applying solely to territory within the United States, show the scope and intent of the general clause to which they are attached. If that had been in-

tended to be universal, there would probably have been some limitations without as well as within.

Mr. Poindexter, delegate from Mississippi, argued that other territory than that belonging to the United States at the time of the adoption might be admitted, because it had been the constant practice to annex Indian territory to the old States, and to form new States of lands purchased from different tribes of Indians in the United States, — alleging that they were foreign powers; not considering that the statement itself showed that the lands were within the United States, and that the political doctrine is that the Indians have only a usufructuary right.

Mr. Wright, of Maryland, urged that Vermont was not a member of the Confederation, nor of the Convention; that she therefore was not one of the United States; was foreign as to them, and she had been admitted, and correctly so, for a long period; forgetting to remember that the territory was claimed by New York, and some of it by New Hampshire, and that it was within the limits of the United States, as defined by the treaty of peace. He contended further, that as the admission of Canada into the Confederation was provided for in the Articles, it could not be doubted that she might be received as a new State by becoming independent, or by purchase; whereas, as has been already suggested, the reason why, after the peace, Canada should have been intentionally excluded from any admission, is quite apparent.

Mr. Wheaton of Massachusetts, and Mr. Gold of New York, denied the right to admit. And Mr. Quincy, who now, at a patriarchal age, contends for constitutional freedom with the vigor and ardor of youth, made a most eloquent argument against the admission, in the introductory part of which he

uttered the memorable declaration, the latter part of which, slightly changed, furnished for a long period, a sort of political war-cry for his opponents: —

"I am compelled to declare it as my deliberate opinion, that, if this bill passes, the bonds of this Union are virtually dissolved; that the States which compose it are free from their moral obligations, and that, as it will be the right of all, so it will be the duty of some, to prepare definitely for a separation — amicably if they can, violently if they must."

I should not do justice to the subject, if some further extracts from that speech were not presented: —

"I think it may be made satisfactorily to appear not only that the terms 'new States' in this article did mean political sovereignties to be formed within the original limits of the United States, as has just been shown, but, also, negatively, that it did not intend new political sovereignties, with territorial annexations, to be created without those original limits. This appears first from the very tenor of the article. All its limitations have respect to the creation of States, within the original limits. Two States shall not be joined; no new State shall be erected, within the jurisdiction of any other State, without the consent of the legislatures of the States concerned, as well as of Congress. Now, had foreign territories been contemplated, had the new habits, customs, manners, and language of other nations been in the idea of the framers of this Constitution, would not some limitation have been devised, to guard against the abuse of a power, in its nature so enormous, and so obviously, when it occurred, calculated to excite just jealousy among the States, whose relative weight would be so essentially affected by such an infusion at once of a mass of foreigners into their Councils, and into all the rights of the country? The want of all limitation of such power would be a strong evidence, were others wanting, that the powers, now about to be exercised, never entered into the imagination of those thoughtful and prescient men, who constructed the fabric. But there is another most powerful argument against the extension of this article to embrace the right to create States without the original limits of the United States, deducible from the utter silence of all debates at the period of the adoption of the Federal

Constitution, touching the power here proposed to be usurped. If ever there was a time, in which the ingenuity of the greatest men of an age was taxed to find arguments in favor of and against any political measure, it was at the time of the adoption of this Constitution. All the faculties of the human mind were, on the one side and the other, put upon their utmost stretch, to find the real and imaginary blessings or evils likely to result from the proposed measure. Now I call upon the advocates of this bill to point out, in all the debates of that period, in any one publication, in any one newspaper of those times, a single intimation, by friend or foe to the Constitution, approving or censuring it for containing the power, here proposed to be usurped, or a single suggestion that it might be extended to such an object as is now proposed. I do not say that no such suggestion was ever made. But this I will say, that I do not believe there is such an one anywhere to be found. Certain I am, I have never been able to meet the shadow of such a suggestion, and I have made no inconsiderable research upon the point. Such may exist — but until it be produced, we have a right to reason as though it had no existence."

"But there is an argument, stronger even than all those which have been produced, to be drawn from the nature of the power here proposed to be exercised. Is it possible that such a power, if it had been intended to be given by the people, should be left dependent upon the effect of general expressions; and such, too, as were obviously applicable to another subject; to a particular exigency contemplated at the time? Sir, what is this power we propose now to usurp? Nothing less than a power changing all the proportion of the weight and influence possessed by the potent sovereignties composing this Union. A stranger is to be introduced to an equal share, without their consent. Upon a principle, pretended to be deduced from the Constitution, this Government, after this bill passes, may and will multiply foreign partners in power, at its own mere motion; at its irresponsible pleasure; in other words, as local interests, party passions, or ambitious views may suggest. It is a power, that, from its nature, never could be delegated; never was delegated; and as it breaks down all the proportions of power guarantied by the Constitution to the States, upon which their essential security depends, utterly annihilates the moral force of this political contract."

In the year 1832, Mr. John Quincy Adams addressed a

letter to Mr. Speaker Stevenson, which was published in the National Intelligencer. Some portions of it relate particularly to this subject. Brief paragraphs follow: —

"Had I been present, I should have voted in favor of the ratification. I had no doubt of the power to conclude the treaty. I did vote and speak in favor of the bill making appropriations for carrying the treaties into execution. . . .

"But I voted against the bill 'to enable the President of the United States to take possession of the territories ceded by France to the United States, by the treaty concluded at Paris on the 30th April last, *and for the temporary government thereof.*' (See Biorens's United States Laws, Vol. III. p. 562, both those Acts.) My speech on the bill authorizing the creation of the stock, may be found in the Fourth Volume of Elliot's Debates and Illustrations of the Federal Constitution, p. 258; and it points out the distinction upon which I voted for one of those bills, and against the others. . . . .

"I believed an amendment of the Constitution indispensably necessary to legalize the transaction; and I further believed the free and formal suffrages of the people of Louisiana themselves were as necessary for their annexation to the Union, as those of the people of the United States. I made a draft of an article of amendment to the Constitution, authorizing Congress to annex to the Union the inhabitants of any purchased territory; and of a joint resolution directing that the people of Louisiana might meet in primary assemblies, and vote upon the question of their own union with the United States. Of both these experiments, had Mr. Jefferson had the courage to make them, the result was as certain as the diurnal movement of the sun. But Mr. Jefferson did not dare to make them. He found Congress mounted to the pitch of passing those acts, without inquiring where they acquired their authority; and he conquered his own scruples as they had done with theirs. . . . .

"The administration, and its friends in Congress, had determined to assume and exercise all the powers of government in Louisiana, and all the powers for annexing it to the Union, without asking questions about their authority. . . . .

"A letter from Mr. Jefferson to Dr. Sibley has been recently published, written June, 1803, after he had received the Louisiana treaties, in which he clearly and unequivocally expresses the opinion that an amendment to

the Constitution would be necessary in order to carry them into full execution. Yet, without any such amendment to the Constitution, Mr. Jefferson did, as President of the United States, sign all those acts for the government and taxation of the people of Louisiana, and did exercise all the powers vested in him by them." . . . .

And last, though not least, Mr. Webster's opinion that the true construction of the Constitution did not authorize the admission of States formed from foreign territory, is clearly expressed in his speech on the exclusion of slavery from the territories; and, I think, in others of his speeches.

I claim thus to have shown you; — by the course of the debates at the time the Constitution was formed, and afterwards; — by argument; — and by the opinions of eminent men; — that the original and true construction of the clause contained in it, giving power for the admission of new States, did not authorize the admission of States formed from foreign territory; and that Louisiana, therefore, was admitted by an act of sovereign power, under color of the Constitution, but not in pursuance of its provisions. — But she is in the Union, and I trust will long remain there. She cannot be put out, nor go out, except by a great political convulsion. Congress could admit, as we see, because Congress did admit; but Congress does some other things without a constitutional warrant. That admission, like those other things, once done, cannot be recalled; and, therefore, *as to the fact of admission itself*, it is the same as if a constitutional authority existed. And so of other States admitted since, and coming within the principle.

But it is by no means true that all the results should follow, the same as if the admission were constitutional. The admission is to be judged of by itself, and not by the constitutional rules which it has violated.

Suppose, instead of the conclusion that Louisiana was admitted by an act of sovereign power, it should be conceded that she was admitted, not without constitutional warrant, but by virtue of a construction of the third section of the fourth article. That is shown not to have been the original meaning nor the original construction, and therefore not the true construction; and such new construction of that article does not enlarge the compromise provision in relation to the representation. The States thus admitted are admitted on such terms as Congress shall prescribe under the new construction, so those terms do not violate the equal rights of others; and especially the equal right of representation, to which the other States of the Union are entitled, except so far as equality has been surrendered by the true construction of the clause respecting representation. — In other words, the enlargement of the clause respecting admission, by construction, and not by the act of the people, does not enlarge the compromise in the clause of representation, nor the application of that clause to cases for which it was not intended.

But it may be said that Louisiana and other new States are entitled to the advantage of this slave representation by virtue of their acts of admission, (that of Louisiana providing, that the State "shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.") In fact a doctrine has recently been broadly asserted which goes still farther, and denies that Congress has a right to attach an exclusion of slavery to the admission of a State; alleging that if Congress admits a State, it must be admitted on an equal footing with other States, and that the whole question of slavery, so far as the States are

concerned, is a local question and the subject of purely local law. It was said in the Convention at Boston: —

"The government of the United States has no power either to make or to unmake State Constitutions. Gentlemen seem to forget that the government of the United States is a government with limited and defined powers — and that this whole question of slavery is, so far as the States are concerned, a local question and the subject of purely local law. If Congress admit a State at all, it must admit it on an equal footing with the other States. The power of Congress to admit a State is the power to admit just such States as the existing States are. The power to admit at all is acquired from an explicit provision of the Constitution, and the word State in that provision means, and can only mean, just what the word State means wherever it occurs in the same instrument.

"To admit a community which should not possess the same degree of sovereignty as is possessed by the people of the existing States, would not be to admit a State — it would be the admission of something else than a State. But Congress may refuse to admit. Of course she may. And these logicians without logic say if she may refuse to admit she may surely admit with conditions. Now, sir, certainly with *some* conditions — but those conditions must be in regard to subjects concerning which the Constitution shall have conferred upon Congress power in reference to the existing States of the Union."

Upon this I remark, first, that the opinion of Mr. Webster, to whose opinions the speaker has been supposed heretofore to have paid some deference, is distinctly shown to have been the other way in his speech on the admission of Texas, in 1845; in that on the exclusion of slavery, in 1848; and in other speeches. He could have had no doubt that a condition annexed, that slavery should be excluded, would be valid.

But I will not rely upon authority alone to controvert this proposition.

The deed of cession by Virginia of the territory northwest

of the Ohio, required that the territory ceded should be laid out and formed into States containing a suitable extent of territory, &c., "and that the States so formed should be distinct republican States, and *admitted members of the Federal Union, having the same rights of sovereignty, freedom, and independence as the other States.*" It was completed, I think, in March, 1784.

It is stated in a paper read by Governor Coles before the Historical Society of Pennsylvania, in June last, that a few days after the deed of cession, at the instance of Mr. Jefferson a committee was raised, consisting of Thomas Jefferson of Va., Samuel Chase of Maryland, and David Howell of Rhode Island, for the purpose of organizing and providing for the government of the territory. Mr. Jefferson, as chairman of the committee, made a report, now to be seen in the archives of Congress, in the Department of State at Washington. It provided, "that the territory ceded, or to be ceded by individual States to the United States, 'shall be formed into distinct States,' the names of which were given and the boundaries defined; and the divisions thus made contemplated and embraced all the western territory lying between the Florida and Canada lines. That is, it included the territory which had been 'ceded' to the northwest of the Ohio River, and that 'to be ceded' to the southwest of that river, or elsewhere, by individual States to the United States." There was a proviso, that both the Territorial and State Governments should be established on a basis, the fifth article of which was, that after 1800 there should be neither slavery nor involuntary servitude in any of said States, otherwise than in the punishment of crimes, &c. On the 19th of April, on motion of Mr. Spaight of North Carolina, this article was struck out. There were six States in favor of the article, three against it, and one

divided; but it required two thirds of the ten States voting to adopt it. This plan of government, as thus amended, was adopted April 2d, 1784, but no organization appears to have been had under it.

In March, 1785, Mr. King of Massachusetts moved a similar provision, which was committed to a committee, but what further action was taken upon it does not appear.

In July, 1786, Congress recommended to Virginia, to revise her act of cession so as to empower Congress to divide the territories into not more than five, nor less than three "distinct republican States," which should thereafter "*become members of the Federal Union, and have the same rights of sovereignty, freedom, and independence, as the original States.*"

Before this was done by Virginia, Congress adopted the immortal Ordinance of July 13th, 1787, and in anticipation of the consent of Virginia, inserted in the 5th article, a provision that there should be formed in the Territory, not less than three, nor more than five States, the boundaries of which should become fixed and established as soon as Virginia should alter her act of cession. And the 6th article prohibited slavery, with a proviso by which a fugitive slave might be reclaimed. This Ordinance passed unanimously.

On the 30th of December, 1788, Virginia passed an act, which, after stating, by way of preamble, the recommendation of Congress; and setting forth the passage of the Ordinance of 1787; recited, ratified, and confirmed the fifth article of the Ordinance;— thus complying with the recommendation.

Now, it seems quite clear, that neither Virginia nor Congress supposed that the prohibition of slavery rendered the States to be formed under the restriction, inferior to the other States; or in any way deprived them of "the same rights of sovereignty, freedom, and independence, as the other

States," which they were to have by the deed of cession, and by the act of Congress requesting an alteration of it. The only change was in limiting the number of States and establishing certain boundaries.

The several acts admitting the States northwest of the Ohio, like the act respecting Louisiana, admit them "into the Union upon an equal footing with the original States, in all respects whatsoever." And yet slavery is for ever prohibited there.

A prohibition of slavery, then, does not deprive a State of its equality with the other States.

The six free States in the Northwest, will learn with some surprise probably, that they hold any degraded rank in the Union. Until the shining of the light which has recently burst forth from the darkness of slavery, no one had a surmise that they were not in the Union upon "an equal footing with the original States."

Again;—the admission of Louisiana was clogged with divers "fundamental conditions." It is admitted that Congress may annex "*some* conditions." Why not a condition restricting slavery? What is there in this condition that renders it improper above all others? Nothing! Nothing whatever. On the contrary, it seems to be just the thing respecting which, a condition should be imposed because of the difference of situation of the different States in that respect, and the inequality of the representation. As some of them are already prohibited from having slaves, they may well insist that if others are admitted it shall be with the same prohibition which rests on them. And what they may insist on, other States are at equal liberty to contend and vote for.

But still further. The article authorizing Congress to admit new States, does not prescribe the terms on which they

shall be admitted. There is nothing, then, against the annexation of any condition which Congress pleases to attach. Any condition, therefore, which is not in conflict with the great principles of the republic, is admissible; and slavery, thank God! is not yet one of those principles. The debate, and the action of the Constitutional Convention, striking out the restriction which had been reported, show that Congress was intentionally left free to impose conditions upon the admission of the new States within the contemplation of the article; and that this was designed to extend even to a restriction upon equal representation in Congress, if the case should appear to require it. Virginia provided against the exercise of this power of Congress to restrict slavery, in the case of Kentucky, by her act of consent. And so did North Carolina, in relation to Tennessee. It is quite clear, then, that when new States are formed out of territory not within the United States at that time, the admission may be upon any terms which Congress sees fit to annex, if they are consistent with the existence of a republican government. If the admission is by an act of sovereign power not warranted by the Constitution, the act of power will of itself determine the limits of its exercise. If it be by a new construction of a constitutional article, such construction may authorize an exercise of the power upon any limitations or conditions, provided they are not in contradiction to the express terms of the article, or to the rest of the instrument, so as to make the Constitution at variance with itself.

It may be asked, — "If the Constitution does not confer upon Louisiana and Missouri a right to a representation on account of their slaves; and if the admission of a State upon terms of equality does not give a right to hold slaves, and have such a representation; how is it that those States have now,

each a representative upon the slave basis? The answer is, that they have such representation by the last apportionment act. Congress has seen fit to place them in the same condition as if they were within the constitutional provision. And as the House is the judge of its own elections, they are secure of it until the next apportionment. In fact, so long as the apportionment stands, the House, it may be said, is bound to recognize the right to the representation that it gives. Congress has admitted the State. The thing is done and the admission stands. It cannot be repealed. Congress has apportioned the representation, and it stands according to the apportionment until terminated.

Those States having had a representation founded on the slave basis, may be unwilling to part with it hereafter; and I, for one, am quite content that they shall retain it, *upon a compromise* that there shall be no farther extension of slavery; provided the compromise may be one which shall not be *compromised* over again.

The argument which I have thus stated respecting the constitutional right to admit new States, is of no practical value so far as it regards the admission of the territories now belonging to the United States. Their admission is a political necessity; and, moreover, the power has been so often exercised, that the further exertion of it in respect to the territories now acquired, may be said to be settled by construction. But it may serve to show that no other territories ought to be acquired for the purpose of admission. — It may serve to show that the territories now existing, even if admitted with slavery, will not be entitled to a representation upon the slave basis. — It may serve to show, that if a State should be

admitted under a restriction of slavery, and should afterwards change her constitution so as to admit slavery, (which some of the people of Illinois once attempted,) she would not thereupon be entitled to a slave representation through a violation of her obligations. — It may serve to show that there is no constitutional objection to a restriction of slavery as the condition of the admission of a State, as the very best means of preventing further inequalities in the representation. — And it may serve to show that the Republican party is not a fanatical party, and that their platform is not a sectional platform.

The hosts which throng upon that platform and cluster around it, are inspired by the same devotion to civil liberty and equal rights which immortalized the fathers in the days of the Revolution. — The pillars of fire which go before those hosts on their onward march, are the pillars of the Constitution. — The thunder which rolls in the light cloud over their heads, and in its reverberations from the Atlantic and the Pacific, — from the Gulf of Mexico and the British Provinces, echoes back, "No Farther Extension of Slavery!" is good, sound, constitutional, Whig thunder. — The forked lightning which plays along the line of their advance, is the electricity of free principles. — And the blazonry of their banners is, "Victory for Freedom!"

NOTE.

PERSONAL: — As the newspapers say when they announce that somebody is about to eat his dinner and lodge at a tavern.

As these sheets were passing through the press, I read in a speech of Hon. Robert C. Winthrop, delivered in Faneuil Hall, October 24th, the following: —

"They charge upon our candidate the earliest suggestion of resistance to the will of the people, the earliest qualification of the modern Republican doctrine of passive submission to the powers that be, — not choosing to remember that from the very same lips by which an off-hand and misconstrued remark of Mr. Fillmore has been most severely criticized and condemned, there had previously fallen the distinct and deliberate declaration, that 'some of his father's blood was shed on Bunker Hill at the commencement of one Revolution, and that there is a little more of the same sort left, if it shall prove that need be, for the beginning of another.' These were the well remembered words, as lately as the 2d of June last, of that learned head of the neighboring Law School, who has felt called upon within a few weeks to quit his official chair, and compromise the neutrality of his position, in order to arraign Mr. Fillmore for having counselled resistance to authority; and who availed himself of the same opportunity, if the newspaper reports are correct, to question the propriety, and ridicule the position of Mr. Winthrop and Mr. Hillard, at the late Whig Convention. I shall not follow his example further than to say, that I would be greatly relieved, as a friend to the University and the Law School, if I could have as clear a perception of the propriety of his course, as I have of that of my friend Mr. Hillard or even of my own." — *Boston Courier, Oct. 25th.*

The "well remembered words" thus repeated, form part of the closing sentence of a speech made by me respecting the infamous as-

sault of Brooks upon Senator Sumner. I like them best in the connection in which they were originally placed, and therefore restore them to the context, quoting a few of the words which preceded them.

"But this is not all. The felon blow which struck down the citizen and the Senator, prostrated at the same time the privileges of the Senate and the freedom of debate guarantied by the Constitution of the United States. It was vengeance for the free expression of unpalatable opinions, and designed to deter others from the exercise of their constitutional rights; and it is but the last of a series of outrages similar in character though not in degree, which have made the city of Washington a bear garden, and the capitol little better than a den of wild beasts.

"It is this blow to freedom of speech and constitutional privileges which gives this act a painful significance, above that of any mere private assault upon a citizen, or even upon one of those appointed to represent the interests of a sovereign State in the Congress of the United States. It is this prostration of constitutional liberty which has called us here at this time, and it is this which demands of us, and of all others who respect the law, and possess a love of liberty, a careful, deliberate, unimpassioned consideration of the consequences to which such occurrences will lead if their repetition is permitted."

* * * * * * * * *

"But notwithstanding all such demonstrations of approbation, it is not to be assumed that this atrocious deed will be characterized as chivalrous, and its miserable perpetrator be hailed as a gallant son of the South, by any beyond the halls of Congress, except a few choice spirits who should rank below the bully and the blackguard. It is by no means to be concluded, as yet, that it will be sustained by high-minded men of honorable standing in the Southern States. And until that is made apparent it is not to be treated as the act of the South."

* * * * * * * * *

"In the mean time, however, with nothing of threat, and nothing of offence, let it be made to appear in all constitutional modes, that these assemblages of the people are not matter of form; that they are not formal protests; that they are not mere expressions of indignation, however deep; but that they are to be taken as the exponents of an unalterable and unconquerable determination to assert and maintain the supremacy of the law; free thought and free speech; freedom of debate and immunity therefor; at whatever cost and at all hazards.

"Let it be understood that the government of the United States must protect the delegates who assemble in her halls of legislation, and not suffer them to be struck down on the very spot where they are entitled to privilege, and immunity, and

absolute safety. Let it be assured that no representative of Massachusetts, — that no representative of any State in the Union, — is to be deterred by violence 'from espousing whatever opinions he may choose to espouse, from debating whenever he may see fit to debate, or from speaking whatever he may see fit to say on the floor of the Senate.' Let it be remembered that there are other forms of oppression more odious than a colonial government and a Boston Port Bill, bad as they were. The stamp act and the tea tax convulsed the civilized world. But taxation, even without representation, is but as the small dust of the balance, when compared with the constitutional right of freedom of debate, within the limits of parliamentary law, in the halls of legislation.

"For myself, personally, I am, perhaps, known to most of you as a peaceable citizen, reasonably conservative, devotedly attached to the Constitution, and much too far advanced in life for gasconade; but, under present circumstances, I may be pardoned for saying that some of my father's blood was shed on Bunker Hill, at the commencement of one revolution, and that there is a little more of the same sort left, if it shall prove that need be, for the beginning of another."

I am not willing to suppose that no difference has been perceived between this expression of opinion, that, When freedom of debate in the halls of legislation is suppressed by violence, and the government utterly fails of being a free representative government, the time will have arrived for a revolution, which shall restore it to its former purity, — and that declaration of Mr. Fillmore, substantially, that, The election of the candidate of one party, according to all constitutional modes and forms, will cause a dissolution of the Union, and should be regarded as furnishing a justification for such a result. — Mr. John M. Botts, a citizen of a Southern State, said of the allegation, that Mr. Fillmore had made such a declaration, that it was a libel upon him, and that if Mr. Fillmore had said it, he would be the last man in the United States that would vote for him. A citizen of a Northern State admits that he so said, but calls it, "an off-hand, and misunderstood remark," and censures those who take exception to it.

But it is alleged that I have compromised "the neutrality of my position." If such be the fact, it will be the subject of profound regret, as I have, just at this time, a very poor opinion of compromises.

In the Revised Statutes of Massachusetts, Chapter 23, Section 7, I read as follows: —

"It shall be the duty of the president, professors, and tutors of the university at Cambridge, and of the several colleges, and of all preceptors and teachers of academies, and all other instructors of youth, to exert their best endeavors, to impress on the minds of children and youth, committed to their care and instruction, the principles of piety, justice, and a sacred regard to truth, love to their country, humanity and universal benevolence, sobriety, industry, and frugality, chastity, moderation, and temperance, and those other virtues, which are the ornament of human society, and the basis upon which a republican constitution is founded; and it shall be the duty of such instructors to endeavor to lead their pupils, as their ages and capacities will admit, into a clear understanding of the tendency of the above-mentioned virtues to preserve and perfect a republican constitution, and secure the blessings of liberty, as well as to promote their future happiness, and also to point out to them the evil tendency of the opposite vices."

QUERE: — How far a Professor of a College "compromises the neutrality of his position," when, as a private citizen, before a different auditory, and in another connection, he endeavors to maintain those principles of piety, justice, regard of truth, love of country, humanity, and those other virtues which are the ornament of human society and the basis upon which a Republican Constitution is founded, which it is made his duty, by statutory enactment, to impress upon the minds of his pupils? — How far he departs from "the propriety of his course" when he endeavors to lead others "into a clear understanding of the tendency of the above-mentioned virtues to preserve and perfect a Republican Constitution, and secure the blessings of liberty;" — and when he attempts to disseminate a knowledge of the true principles of the Constitution of the United States?

Perhaps it may be admitted as some extenuation of my failure to know when, and where, and upon what subjects I may speak, that I was not before aware of the fact that upon great questions of morals and politics, involving, possibly, the very existence of a free government, I hold any neutral position.

J. P.

Joel Parker

CRITICISM CRITICISED.

INTENDED AS A

SUPPLEMENT

TO

THE LAW REPORTER

FOR

JANUARY, 1859.

"'*Report me and my cause aright.*'"

Law Reporter.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1859.

CRITICISM CRITICISED.

THE readers of these sheets will not need to be informed that there is at this time before the Legislature of Massachusetts the Report of a Commission appointed to revise and consolidate the General Statutes of the Commonwealth.

The subject is one which has engaged the attention of the Legislature, and of the people, more or less, for the term of five years. A proposition for a revision was introduced into the Senate in 1854, and a report was made in favor of the measure by a joint committee of both Houses; but, as the members of the committee were not agreed upon the mode in which the work should be done, the subject was referred to a commission of three learned jurists, who unanimously recommended the appointment of commissioners to revise and consolidate the general statutes according to a plan set forth in the report, for which purpose they reported the form of a resolve.

The resolve was adopted by the Legislature of 1855, and commissioners were appointed. A partial appropriation towards the expenses of the work was made in 1857, and great impatience was manifested in the Legislature of 1858 because the commissioners had not performed an impossibility, by having their report in readiness at that time. It may fairly be inferred from these facts, that a revision of the statutes is desired by the people.

In December, 1858, the commissioners closed their labors with a report in the form of a bill, which contains one hundred and eighty-three chapters, covering about thirteen hundred and seventy-five pages of large octavo, with notes stating the changes which the chapters thus drawn would make in the existing laws, and an introductory report explaining the general principles upon which the work is constructed and the manner of their application.

It is quite apparent that such a work, produced under such circumstances, forms no fit subject for a sharp or captious criticism. The special provisions of the resolve must necessarily operate as limitations, restricting the commissioners both in thought and action. Their duty was, not to legislate, but to reproduce existing legislation in a condensed form, and at the same time in such manner as not to give rise to suppositions of changes, where none were intended.

Power was conferred on them to suggest mistakes, omissions, &c., and the manner in which they might be corrected and amended, but with no right to strike out new measures of legislation, according to the particular views of the commissioners; and they were bound to exercise the power of suggestion cautiously, so as not to seem to invade the province of the members of the Legislature, who were to pass upon the work.

To require of the commissioners, in all cases, perfect accuracy of construction, out of the complex materials before them, would be to exact an impossibility. To demand the highest style of finish in composition, at the same time that the language of existing laws was to be preserved as far as practicable, consistently with the object, in order to avoid suppositions of changes, would be much more oppressive than the requirement of the Egyptian taskmasters, who demanded bricks, but did not furnish the straw then supposed to be necessary for their manufacture.

While the work itself was not of a character to admit

the application even of the ordinary rules of criticism applicable to literary productions, and still less of a cavilling notice, the commissioners, in the execution of their duty, and in their introductory report, did nothing to provoke a style of criticism such as we have spoken of. There is no boasting in saying, "That there has been a measure of success in the attempt at compression, will appear even upon a superficial examination"; or in adding, in reference to the difficulties of construction, "They were obliged to decide, as well as they might, for the purposes of this revision; and they trust that they have not made many or very grave mistakes in this particular." They could hardly have said less. Perhaps they might, without any undue exhibition of vanity, have said something more. But we think they are not supposed to be of the class who go about asking the newspapers to mention their names that they may be seen of men, and they doubtless had a sufficient knowledge of the difficulties attending their work, not to boast greatly even at the time when they were putting off their harness, after a hard campaign.

The commissioners neither deprecated nor sought to avoid criticism. A reasonable measure of self-reliance, and the approbation of persons well qualified to judge, to whom portions of the work were submitted during its progress, might well have led to the belief that the report was not destined to be "rejected as an abortion from which no good could come"; because, after an approval by persons whose duties made them experts to a considerable extent in different branches of it, such a rejection would stultify the members of the Legislature, and not the commissioners. But they not only expected, they desired, that the Legislature should give the work a thorough examination, in order that all errors might be corrected, or if any were left, that the responsibility therefor should rest upon the Legislature, and not with them. And they would doubtless have been pleased to receive from any gentleman suggestions of supposed errors, that the matter might be explained or corrected.

Under such circumstances it may be said that it was the duty of the conductors of any periodical which took an interest in the revision, to render aid according to its ability in the accomplishment of the object, and most especially was this true in regard to any legal periodical within the Commonwealth. The necessity of such a work was too palpable, and the desire of the people had been too distinctly manifested, to permit a doubt whether such a periodical was, in fairness and honesty, at liberty to cast obstructions, however insignificant they might prove, in the way of a revision, either by a direct opposition or by a covert attack.

And it was the duty of such periodical, in any notice of the Report, to deal fairly with it, and to consider the commissioners no further responsible than for a faithful execution of the work within the limitations and surrounded by the difficulties necessarily attendant upon it. How far these duties, whether of a positive or of a negative character, have been performed by the "Law Reporter," published in Boston, may be seen in a critical notice of the revision contained in the number of that periodical for the present month, which has been regarded of such value that it has been published in a separate pamphlet.

It is said in the early part of that article: —

"The work before us bears the marks of the learning and talents of its authors. The laws are, so far as a very general examination will serve us to ascertain, well collated, and arranged according to the instructions contained in the resolve, and there is very great value in the code thus presented to us. The marginal citations have been made with great pains and fidelity, and the whole report is a most valuable depository of and index to the statutes. To bring it to the business test, it is worth much more than the compensation of the commissioners, and the expenses thus far incurred, will amount to. In a work so laborious and so difficult, errors are to be expected, — are indeed, to a certain extent, unavoidable, — and we are far from intending to be understood, by any remarks we may make on such errors, to imply that similar errors might not be found, and in greater degree, in most legislative productions of these days."

It may seem incredible, that after such a broad admission of the ability and diligence of the commissioners, and of the value of their work, any other than a just and impartial, not to say kind criticism, should follow; but we find immediately a clause of a different character.

"In examining minutely," it is said, "those parts of the work which we have above enumerated, we find that the learned commissioners labor under two special disqualifications. They have not sufficient practical knowledge of the present state of our statute law, a knowledge to be acquired only by every-day practice in court or in chambers, and without which no man, whatever his talents and whatever his acquirements in other respects, could safely venture upon the work which the learned commissioners have undertaken. And, secondly, the learned commissioners have not applied to the execution of their task a perfectly nice and critical appreciation of the idioms of the English language; a most common failing in our legislators, and perhaps taken, in this instance, by contagion from the more recent of the laws with which the commissioners have been so closely connected."

Such a want of knowledge of the subject that the commissioners could not safely venture upon the work they had had the presumption to undertake, and such a failure to express in appropriate English the ideas they happened to have, certainly evince rather grave disqualifications.

Whether the paragraph in which the above charge is made is a well-constructed specimen of "idiomatic English," is a question upon which we shall not waste our time.

After this general onset upon the commissioners, portions of the Report, selected probably on the supposition that errors might be found there, if anywhere, are attacked in detail, with a malignity and unfairness limited only by the strength and ability of the assailants. The intention to be captious is avowed, and, aside from the avowal, the design is apparent from the manner and matter of the article. It is doubtless true that "captiousness even, on the part of the learned" "critics, may save much future quib-

bling"; — by exhausting a large store of it at the present time.

The article is in the main like the argument which we sometimes hear from a belligerent and conceited lawyer upon his third or fourth case. He must appear to be astute; he must be positive; he must sneer a little; he must make the opposing counsel welcome to some piece of information; &c., &c.; — all which we see in the article before us. The commissioners are designated as "the verbal critics of the Revised Statutes," and taunted with "the great labor they have expended in gilding the refined gold of the Revised Statutes." It is asserted that they

"have substituted, in numerous instances, the plural for the singular," "put the indefinite *a* for the definite *the* and for the distributive *any* or *every*, and have used the present tense of the indicative in place of the future and the subjunctive"; that, "to rid themselves, also, [?] of the awkward repetitions of 'city or town,' an expression which they have unnecessarily substituted for 'town' alone, (*Rev. Stat.*, *c.* 2, § 6, *clause* 17,) they have resorted to the much more awkward and quite inexact word 'place,' which in respect to its position in idiomatic English, may be said to be 'nowhere.'"

Certainly an awkward position for that word. And then the learned critics say: —

"We will leave this part of our subject with two or three elementary observations on language, to which the learned commissioners are quite welcome.

"1st. In a body of laws, as in all scientific expositions, true elegance must coincide with exactness of expression; and when the same idea is to be repeated, it is not only allowable, but necessary to repeat the same words, unless some other words express the idea with equal precision.

"2d. The indefinite article is not adapted to the designation of a definite object.

"3d. The present tense of the indicative mood is not capable of doing the work of all the other moods and tenses, excepting in a very imperfect manner."

After this magnificent exhibition of elementary wisdom and grammar, the critics attack portions of the report, right and left, both on form and substance; occasionally, however, giving it a little pat on the shoulder, as a very clever fellow, notwithstanding all its sins and iniquities of omission and commission.

There are other paragraphs besides those relating to the diligence exhibited, the great value of the work, on the one hand, and the special disqualifications of those who executed it, on the other, which savor a little of incongruity. After a page or two of alleged errors, we find, —

"These examples of inadequate and inelegant expression might be indefinitely extended, but our limits oblige us to turn to such mistakes of substance as we have found in the few chapters which we have examined, and which we have ventured to attribute to a want of practical knowledge of the existing law." — Again, "our readers" "will see" "that the learned commissioners have unconsciously, and apparently by slight inaccuracies of expression, introduced much confusion into the important subject of the jurisdiction of the higher courts."

Then follows another series of accusations, comprising alleged "mistakes of substance," and "some extraordinary blunders," in the few chapters which the "Reporter" professes to have examined, quite too numerous to be committed with impunity. And in passing from one to another of these the critics say: —

"It was the duty of the learned commissioners to inquire and examine into the legal effect of the language which they made use of, so far at least as well-known principles of law and the materials under their hands would enable them to do so. In neglecting this duty, they very much increase the confusion which they ought to dispel," &c.

But near the close they seem to think, that, if rejected entirely, "much of the good which it has accomplished would survive, and the report would always be a valuable digest of the written law."

What would thus seem to be rather grave inconsistencies, may perhaps be accounted for by the fact that the "Reporter" has two editors. We were strongly reminded, as we read the different portions of the article, of the description, in the Antiquary, of the law partnership of Messrs. Greenhorn and Grinderson.

"Well said, Mr. Gilbert Greenhorn," said Monkbarns; "I see now there is some use in having two attorneys in one firm. Their movements resemble those of the man and woman in a Dutch baby-house. When it is fair weather with the client, out comes the gentleman-partner to fawn like a spaniel; when it is foul, forth bolts the operative brother to pin like a bulldog."

The difference between the two cases is, that in this instance the fair and foul weather are somewhat mixed up, and that both — partners come out at the same time. But that does not seem to be material.

How it is that a gentleman who "enjoys a high reputation for ability, learning, and legal acumen, well deserved by his faithful and distinguished services as chief justice of the highest court of another State, and as senior professor of the Law School at Cambridge," and another who "has served uprightly and ably in the judiciary of this Commonwealth, and is known as a gentleman of great industry, learning, and accuracy," should, when acting together, labor under such special disqualifications; and how it is that in a work bearing "the marks of the learning and talents of its authors," "well collated and arranged, according to the instructions contained in the resolve," of "very great value," with "marginal citations" "made with great pains and fidelity," "the whole report" being "a most valuable depository of, and index to, the statutes," and which if rejected "would always be a valuable digest of the written law," the authors, in the few chapters selected, should have introduced much confusion into the important subject of the jurisdiction of the higher courts, should have so neglected their duty that "they very much increase the confu-

sion which they ought to dispel," or should, in the small space indicated, have committed half the errors with which they are charged, we leave Messrs. Greenhorn and Grinderson of the Law Reporter to explain.

Desirous of imitating as far as we may the courtesy which the learned critics of the Reporter have extended to the commissioners, and as nearly as may be in their own formulas, we take occasion, before proceeding farther in the examination of the article, to inform our readers, that the senior editor of the Law Reporter is John Lowell, a graduate of Harvard University of the Class of 1843, and a graduate of the Law School connected with that institution; that he obtained an honorable admission to the Bar, and is known, so far as the circulation of that publication extends, as senior editor of the Law Reporter. Within some two or three weeks he has been appointed a Master in Chancery. For aught we know, he has faithfully discharged the duties of that office thus far.

The junior editor is Samuel M. Quincy, likewise a graduate of the same University, of the Class of 1852, who studied the law, and was admitted to the Bar, after which he became junior editor of the Law Reporter. He probably owed this promotion to the fact that he could arrange the abstracts of decisions, and read proof-sheets. "Both are gentlemen whom to know is to respect" — in their proper sphere, when they behave themselves with propriety.

But we are constrained to say, from a minute examination of the whole of their article, that we find that the learned editors "labor under two special disqualifications." According to the evidence as disclosed in the article itself, they were not born into the world for the purpose of criticising the work of the commissioners, and they have not, by any works of their own, been able to overrule the designs of Providence, which intended them for something else. "They have not sufficient practical knowledge" of

the subject; "a knowledge to be acquired only by" a careful study of the work itself, "and without which no man," even if he had been born for the purpose, "could safely venture upon the work which these learned" critics "have undertaken." "And secondly, the learned critics have not applied to the execution of their task a perfectly nice and critical appreciation" of the duties of a legal critic; "a most common failing" in persons who enter upon that department, "and perhaps taken, in this instance, by contagion from" some client or friend who has an interest that the whole attempt at revision should be defeated.

And now having discharged our conscience of the weight of obligation resting upon it, (the reader will please pardon this confusion of the plural and singular, for we have but one conscience,) we proceed to examine the evidence adduced by the learned critics to sustain their two specifications of disqualification on the part of the commissioners; to wit, a want of knowledge of their subject, and secondly, a failure to express such ideas as they had.

Perhaps we may as well consider the evidence in the order, or rather want of order, in which the critics offer it, and thus the last specification shall be first.

The critics profess to be confining their attention chiefly to clearness and perspicuity of expression, and say of the commissioners: —

"They give us such rough jewels as these:

"Ch. 11., § 5. (Declaring what property shall be exempted from taxation.)

"'*Tenth.* The property to the amount of five hundred dollars of a widow or unmarried female, and of any female minor whose father is deceased, if her whole estate real and personal not otherwise exempted from taxation does not exceed in value the sum of one thousand dollars.'

"Why the property of 'female minors' who are neither single nor widows, that is, who are married, should be exempted from taxation because their fathers are dead, is not apparent, seeing that

they are by their marriage emancipated from the paternal control, and entitled to support from their husbands only."

This is the first example of "inadequate and inelegant expression." The criticism upon the clause cited seems to be only a question why the property of female minors who are neither single nor widows, that is, who are married, should be exempted from taxation. The roughness of the jewel, therefore, seems to consist in the substance of the gem, — in the fineness of the water, — and not to be the result of labor, or want of labor, on the part of the lapidary. ["Very nice and critical appreciation," &c.]

There was sufficient clearness and perspicuity in the provision, to enable the learned critics to understand it, and that seems to be quite sufficient. But the words "female minors" are included in marks of quotation, thereby, perhaps, implying an additional objection. Do the critics mean to say that female minors are rough jewels? If they do, we cannot admire their gallantry. Do they mean to say that some other words would better designate females under age? If they do, it is to be regretted that they did not give us their better version. The clause is a revision of Ch. 43, Statutes of 1858,

"Sect. 1. The property of any widow or unmarried female, or of any female minor whose father is deceased, to the amount of five hundred dollars, shall be exempted from taxation: *provided*, that the whole estate, real or personal, of such person whose property is so exempted from taxation, does not exceed in value the sum of one thousand dollars, exclusive of property exempted from taxation by existing laws."

The Legislature had doubtless sufficient reasons for exempting the property of widows and unmarried females, and of married women who are minors and whose fathers are dead. They saw fit so to do; and as no change is apparent which should affect the policy of the enactment, the commissioners might well have been supposed to overstep the limits of their duty, had they attempted to deprive female minors who are married of the benefit of it.

The commissioners polished the jewel so far as they thought their duty required, and we submit that its intrinsic value will not be enhanced by employing the file of the learned critics upon it.

The critics next cite from the same chapter,

"Sect. 12. Clause 1. All goods, wares, merchandise, and other stock in trade, including stock employed in the business of manufacturing or of the mechanic arts, in cities or towns within the state, other than where the owners reside, shall be taxed in those places where the owners hire or occupy manufactories, stores, shops, or wharves, whether such property is within said places or elsewhere on the first day of May of the year when the tax is made."

Upon which they comment as follows: —

"We hope the assessors will know how to 'make' their taxes on these goods which are and yet are not in cities or towns other than where the owners live, and which are to be taxed in some place which is neither here nor there; especially if the owners of these goods should happen to occupy stores, &c. in more than one town."

From their previous criticism on the word *place*, and from what is said about *place* here, it might be supposed that this unfortunate word created the difficulty in the minds of the learned critics. But perhaps it is because they think that an *if* is lacking, which may be found in the sections revised, [a gentleman critic of a former day says "there is much virtue in an if,"] and that instead of the present reading, "*shall be taxed in those places where the owners hire or occupy manufactories*," &c., the section should read, *shall be taxed in those places if the owners there hire or occupy manufactories*, &c. If this is the objection, we think the difference is one between *tweedle-dum* and *tweedle-dee;* and that the assessors will know how to "make" their taxes just as well with the clause as it now stands, as they would if any other form of expression were to be substituted.

But there is, perhaps, a covert criticism here in the en-

closure of the word *make* in marks of quotation. The clause ends, "when the tax is made."

Will some lady friend kindly favor us with the use of her smelling-salts? There is a slight *faintishness* coming over us.

Hereafter let no person who has any pretensions to "a nice and critical appreciation of the idioms of the English language" presume to speak or write of "making taxes." The seal of condemnation has been set upon *make*, in that connection, in all its forms, whether of the verb or participle. True, this phraseology may be heard all over the state, (Boston, perhaps, excepted,) every year, in the season for *making taxes*. True, it is a part of the "refined gold" of the Revised Statutes: "making of any tax," R. S., Chap. 7, § 15. "Alas, how has the gold become dim, and the fine" ["refined"] "gold changed!" True, Mr. Justice Wilde uses the ery same obnoxious word: "if the tax was made," 1 *Cush.* 163. True, Mr. Justice Morton does the same: "make any tax," 5 *Pick.* 501; "having made a tax," 10 *Pick.* 546. True, Mr. Justice Dewey does the same: "collector of taxes or assessments made upon the proprietors," 5 *Met.* 362. But what of that. Mr. Justice Wilde, Mr. Justice Morton, and Mr. Justice Dewey are only learned scholars and jurists. Neither of them has been an editor of the Law Reporter. If it were worth the search, we might probably find a hundred instances of this use of "make" in the Reports.

We recommend to the learned critics to gain a practical knowledge of the use of the English language by "airing their vocabulary" in some broader field than "chambers."

In the next specimen we are more fortunate, inasmuch as the critics give us their emendation.

After copying from Chap. 11, as follows: —

"Sect. 20. Keepers of taverns and boarding-houses, and masters and mistresses of dwelling-houses, shall, upon application of an assessor in the place where their house is situated, give information of the names of all persons residing therein and liable to be assessed for taxes. Every such

keeper, master, or mistress, refusing to give such information, or knowingly giving false information, shall forfeit twenty dollars for each offence,"—

the learned critics say: —

"We should think the verbal critics of the Revised Statutes might have translated this section somewhat after this manner: 'Every householder shall, upon application of an assessor of the town where his house is situated, give the names of all persons residing in said house, etc., and upon refusal, etc.'"

Our first remark upon this must be that the commissioners were not appointed to "translate" the statutes, nor to "translate" their own work. "Nice and critical appreciation," &c. "True elegance must coincide with exactness of expression," &c.

Are the learned critics quite sure that it would be safe thus to substitute "every householder" for "keepers of taverns and boarding-houses, and masters and mistresses of dwelling-houses"?

The commissioners copied this part of the section from section 1, chapter 176, statutes of 1837, changing the distributive *every keeper* to *keepers*, &c. If "householder" should be substituted, it ought equally to be so in section 3, chapter 13, of the revision, where similar phraseology is used requiring information respecting persons "liable to enrolment or to do military duty." But that is copied from section 2, chapter 92, statutes of 1840, with a like change from the distributive to the plural. The latter is a revision of section 6, chapter 12, Revised Statutes, where we find the same phraseology; and that in turn is a revision of section 20, chapter 108, statutes of 1809. To make the change, therefore, which the learned critics require, would be to depart from the phraseology adopted nearly half a century since, sanctioned by the commissioners, the committee, and the Legislature in 1835, and followed in 1837 and 1840. Had the commissioners made such a change in the militia chapter, perhaps something might have been said about the "verbal critics of the Revised Statutes" having gilded "the refined gold," &c.

But all this may not be conclusive against the alteration. Are the critics prepared to say, that, if the commissioners had made the alteration, they would not have made an essential change in the rule of law? They do so say by the manner in which they put the charge. But will they stick to it? Gentlemen having a "practical knowledge" of the law, "acquired by every-day practice in court" *and* "in chambers," and whose opinions are entitled to all possible respect, assure us that such a change as the critics propose would make two, probably three, alterations in the rule. A household is defined to be "a family living together." Is a keeper of a tavern a householder? or if he may be in some cases, is he always so? Do all the persons residing in an inn, who are liable to assessment for taxes, belong to the innholder's family, when the connection of several of them with him is merely that they board and lodge in the inn, and pay their bills? But suppose they may be regarded as a part of his family if he keep but one inn; how is it when a worthy gentleman keeps three inns, and lives himself with his family in a fourth tenement? Are the boarders in the different inns a part of his household, — by constructive annexation?

Again: are all the inmates of a boarding-house part of the family of the keeper of the house? Suppose they are, and a man opens a boarding-house, puts his wife in charge, and goes to California or Japan on business. She is the keeper of a boarding-house, but is she a householder?

Again: as the statute stands, mistresses, as well as masters, of dwelling-houses, are required to give the information. A man and his wife live together in a dwelling-house. He is the master, and she is the mistress, of the dwelling-house. The same learned gentlemen say that, on the statute as it stands, she may be required to give the information; which, if the husband were absent but for an hour, might save the assessors the necessity of calling

again. But if the house belongs to him, she is no "householder." What say the learned critics?

The next "example" of the "rough jewels" (it must be the "rough" jewellers who sell by "examples") is taken from the same chapter, the first part of which is a revision of Sect. 1, Chap. 169, Statutes of 1852. The original enacts, that

"When any person shall hereafter give notice in writing to the assessors of any city or town in this Commonwealth, accompanied by satisfactory evidence that he was, at the time of the last annual assessment of taxes in said city or town, an inhabitant thereof, and liable to pay a poll tax, and shall furnish, under oath, true lists of his polls and estate, both real and personal, not exempted from taxation, it shall be the duty of said assessors to assess such person," &c.

At the end of the section is added: —

"*Provided*, the application aforesaid shall be made at least seven days prior to the day of any election."

The commissioners revised as follows: —

"Sect. 48. When a person shall, seven days or more prior to any election, give notice in writing, accompanied by satisfactory evidence, to the assessors of a city or town, that he was at the time of the last annual assessment of taxes in such place an inhabitant thereof, and liable to pay a poll tax, and shall furnish under oath a true list of his polls and estate, both real and personal, not exempt from taxation, the assessors shall assess," &c.

The critics copy the section as revised, and then say: —

"The meaning of this section would be more correctly rendered thus:

"'Whenever any person shall, seven days or more before any election, give written notice and satisfactory proof to the assessors of any town, that he was an inhabitant of such town and liable to assessment but not assessed therein, at the time of the last annual assessment of taxes, and shall furnish under oath a true list of his polls, etc., the assessors shall assess him therefor as if his list had been duly brought in, and shall enter the tax thus assessed in the tax list of the collector of the town, who shall collect and pay it over as if originally entered therein. And the assessors shall, five

days at least before every [?] election, deposit with the clerk of the town a list of the persons so assessed.'"

It is but in accordance with the general character of the rest of their criticism, that in this more correct rendering the learned critics have made one alteration, which they specify, and one blunder, which they do not specify. According to the original and the revision of the commissioners, in order to entitle a person to give the notice, &c., he must be an inhabitant "liable to pay a poll tax." According to the improved rendering of the learned critics, he must be an inhabitant "liable to assessment." There are many persons liable to assessment, who are not liable to pay a poll tax.

No reason is given why the commissioners should have inserted such an alteration. On the contrary, the learned critics understand that the "meaning of this section would be more correctly rendered" in their mode, thereby showing that they did not discover the change which they had made.

As to their alteration, they say: —

"We have added here the requirement that the person claiming this privilege shall not have been already assessed; as the report stands, any one might wait until his tax bill was rendered, and then claim, under this section, the right to bring in his list with the same effect as if rendered at the proper time."

Why do the critics say, "as the report stands"? Why not say, "as the statute stands"? Do they desire to make it appear that the commissioners have altered the provision, and that the critics have restored it? So it would seem, for they profess to be stating objections to the report, and not to the existing law. But in fact the commissioners have revised the statute as it stands, seeing no cause to propose a change; for it is not true, as the critics suppose, that a man may wait until his tax bill is rendered, and then claim under this section the right to bring in his list with the same effect as if rendered at the proper

time. The object and operation of the provision are well understood out of "chambers."

Will the critics say, in excuse, that these changes are not of great practical importance? That, perhaps, is not quite so clear. But suppose no material change were made. The commissioners are condemned for much smaller matters by the learned critics [we were about to write "Thebans" by way of variety, a word sometimes used, but "inexact"; and we recollect, that "when the same idea is to be repeated, it is not only allowable, but necessary, to repeat the same words, *unless some other words express the idea with equal precision.*" See *ante*, Elementary Observations on Language, by the editors of the Law Reporter, Observation 1st.]

It occurs to us to inquire, by the way, whether persons who bring to "their task a perfectly nice and critical appreciation of the idioms of the English language," could write "*give* written notice and satisfactory *proof*." Lawyers talk about giving evidence, and sometimes speak of offering or of furnishing proofs. But would a lawyer who had a critical care respecting his phraseology say he was ready to *give proof?* Such a mode of expression might answer for the commissioners; but may these learned critics thus trifle with the idioms? We pray judgment. We might urge further, that *evidence* is that which tends to show a fact, or the *medium* by which a fact is established; and that *proof* "is applied by the most accurate logicians to the *effect of evidence*," for which we refer them to Greenleaf's Evidence, Vol. I. Part I. Chapter I. Section 1. But this is a distinction which these very learned critics can hardly be expected to appreciate. "True elegance must coincide with exactness of expression." See Elementary Observations before cited.

We come next to what are alleged to be mistakes of substance, and we find the following introductory paragraph: —

"We begin with the chapters on the supreme court, court of

common pleas, and superior court, and find some extraordinary blunders in the important matter of their respective authority and jurisdiction in civil cases."

It is in relation to this subject also that it is said the commissioners "very much increase the confusion which they ought to dispel," &c.

It will be found, we think, that the "confusion" has been introduced into the brains of these very learned critics by some other agency, and that the "extraordinary blunders" are of their own manufacture.

They first extract from the chapter concerning the court of common pleas.

"Chapter 113, § 4. The court shall have exclusive original jurisdiction of complaints for flowing land, and of all civil actions not cognizable by police courts and justices of the peace and of which the supreme judicial court has no jurisdiction.

"§ 5. The court shall have original and concurrent jurisdiction with the supreme judicial court of writs of entry for the foreclosure of mortgages, actions respecting easements on real estate, petitions for partition, and of all other civil actions in which the sum demanded in damages exceeds three hundred dollars; and original and concurrent jurisdiction with police courts and justices of the peace, of actions of contract, tort, and replevin, of which such justices have jurisdiction, where the debt or damages demanded, or the value of the property alleged to be detained, exceeds twenty and does not exceed one hundred dollars; except actions of replevin of beasts distrained for the recovery of any penalty or forfeiture, or to obtain satisfaction for damages."

Upon these sections the first commentary is this: —

"What are the 'other civil actions' of all which this court is to have concurrent jurisdiction with the supreme judicial court? We do not see how the word 'other' can be construed to relate to any actions excepting such as the context points out; it can hardly refer back to the chapter on the supreme court, in which certain civil actions are placed under the exclusive cognizance of that court. If not, this section purports to give to the court of common pleas concurrent jurisdiction of real actions in which damages happen to be demanded, of actions of waste and of tort in the nature of waste, all which have heretofore belonged, and which the commissioners have already said shall continue to belong, exclusively

to the higher tribunal. In the act from which this section was taken there is no such ambiguity."

If it were true that "other civil actions" cannot be construed to relate to any actions except such as the context points out, the context points to actions of which the supreme court have concurrent jurisdiction with the common pleas, and not to actions of which the supreme court have exclusive jurisdiction, or of which the common pleas have exclusive jurisdiction.

By Sect. *six*, Chap. 112, exclusive jurisdiction is given to the supreme court, of actions of waste and of tort in the nature of waste, &c. By Sect. *seven* of the same chapter, the same court is to "have original and concurrent jurisdiction with the court of common pleas, and in the county of Suffolk, with the superior court, of writs of entry for foreclosure of mortgages, actions respecting easements on real estate," &c., "and of all other civil actions in which the damages demanded or property claimed shall exceed in value," &c.

Will the critics contend that this section gives the supreme court concurrent jurisdiction with the common pleas of actions of waste, and of tort in the nature of waste, in which the damages demanded exceed $3,000 in Suffolk, and $300 in other counties, because the words "other civil actions," as used in this section, include actions of waste, and of tort in the nature of waste; and that they cannot look back to the preceding section and see that exclusive jurisdiction of the last-named actions is given to the supreme court, for which reason the common pleas cannot have a concurrent jurisdiction, nor the supreme court a jurisdiction concurrent with any other court? The confusion in their minds does not seem to have reached that precise point. But the argument would be just as valid as the one they make upon the chapter relating to the common pleas. Reference may be had to a preceding chapter, as well as to a preceding section of the same chapter. If the critics had studied the work better,

they would have discovered that all the chapters form but a single bill, divided into chapters for convenience. The different parts are adjusted with reference to each other. The whole is to be construed together. To put the case a little stronger: — Chap. 112, having provided in section *six* that the supreme court shall have exclusive jurisdiction of actions of waste, and of tort in the nature of waste; and in section *seven*, that that court shall have concurrent jurisdiction with the common pleas in certain actions enumerated, and of all other civil actions in which the sum demanded in damages shall exceed $300; — if the chapter relating to common pleas had given to that court concurrent jurisdiction with the supreme court, of *all civil actions* in which the sum demanded in damages exceeds $300, that jurisdiction would not include actions of waste and of tort in the nature of waste. No lawyer, practising out of "chambers," would think of raising a doubt about it. The misfortune of these very sagacious critics is, that, having studied the law in but a limited way, they are not familiar with its principles and maxims; and from practising in "chambers" they are short-sighted.

The second commentary which the critics make on sections *four* and *five* of Chapter 113, is this: —

"To make amends to some extent for this enlargement of its powers, the commissioners have deprived the court of common pleas of most of its jurisdiction over suits of replevin. For, in such suits, 'the sum demanded in damages' is only such as the plaintiff may choose to consider himself to have suffered by the *detention* of the property sought to be recovered; a thing quite accidental in its relation to the substance of the issue, and which bears no fixed proportion to the value of the property itself. By the existing law, the courts have concurrent jurisdiction of all such suits where the 'damages demanded *or property claimed* exceeds, etc.' The important words which we have italicized are omitted in the new draft."

It seems almost cruel to say that here also the learned editors are unfortunate in not having studied the work

they undertake to criticise, far enough to find that it contains a chapter upon replevin. If they had made that discovery, they might have read: —

"Chap. 143, § 11. When the property alleged to be detained does not exceed in value one hundred dollars, the writ may be sued out from, and returnable to, a justice of the peace, or police, or justice's court, for the county in which the goods are detained; and in all cases the writ may be sued out of the court of common pleas, or, in the county of Suffolk, the superior court, and shall in such case be returnable to the same court for the county in which the goods are detained."

This is the way in which the commissioners "have deprived the court of common pleas of most of its jurisdiction over actions of replevin."

Will the learned critics attempt to excuse their "extraordinary blunder," upon the ground that this provision ought to have been in the chapter concerning the common pleas? Its position is part of the "refined gold of the Revised Statutes." Nothing is there found respecting replevin in the chapter concerning the common pleas. The commissioners found the matter in the chapter on replevin, and left it there.

But the omission of the words "*or property claimed*" would not deprive the court of common pleas of any jurisdiction over the action of replevin, if there had been no provision respecting the jurisdiction in the chapter on replevin; because a party can as easily demand in damages a sum exceeding $300, as he can allege that the value of the property claimed exceeds that sum, and much more easily than he can prove the latter fact. The omission of those words, therefore, in the fifth section, is quite unimportant as it respects any action.

The learned critics next quote sections *eleven* and *twelve*, Chap. 113, respecting the removal of actions, as follows: —

"Sect. 11. Actions entered in the court when the *ad damnum* in the writ is over three hundred dollars may before the trial has commenced be carried by consent of parties to the supreme judicial court, etc.

"Sect. 12. If the defendant in such an action or the respondent in a pe-

tition for partition, or any person on behalf of either of them, at the first term at which such defendant or respondent is held by law to appear, shall make oath, etc., he may remove the action."

Upon these sections this is the commentary: —

"Here, too, the words 'or property claimed,' are omitted; so that if replevin suits for property worth more than three hundred dollars could, by any construction, get into this court, it is certain that they must stay there until they are tried, unless the plaintiff shall have demanded considerable damages for the detention of the property. Besides, there are writs of entry to foreclose mortgages, in which no *ad damnum* is usually inserted, which are now and should continue subject to this law of removal, but in which, if this section be adopted, the choice of the forum will rest solely and conclusively with the plaintiff."

If by this the learned critics intend to be understood that the words "or property claimed" are omitted in section *eleven*, they are entirely mistaken. That section is a revision of part of Chapter 162, Statutes of 1844, where the right of removal by consent of parties is made to depend upon the "*ad damnum*."

But in relation to section *twelve*, it is true that the words have been omitted; and it is perhaps true that in this particular the commissioners have committed an error, — one which is not extraordinary, and which would create no confusion whatever, — one which is in fact very unimportant so far as any practical consequence is concerned, — but still an error.

We will not waste time in showing what a very limited class of cases it can effect, nor in speculating how it might have happened; whether the commissioners thought the provisions of this section should be assimilated to those of section eleven, which is a revision of a later act, and intended to make the omission, so as to put removals by the agreement of the parties and by the act of the defendant on the same ground, and failed to make a note of the change, or whether it was from some other cause, let it stand confessed that the change may affect writs of replevin, and

writs of entry to foreclose mortgages, when *the plaintiff sees fit to lay his damages so low as to deprive himself and the defendant of the privilege of carrying the case up, before trial, by agreement.* As the parties may still have a trial in the common pleas, and go to the supreme court on questions of law, the cases affected by the omission, if the section were to remain as it is, would not be cases of great hardship.

We next find a criticism on the chapter concerning the superior court. It is said: —

"Turning to the superior court, which is the common pleas made local, we find that its concurrent jurisdiction is defined only by a general reference to the chapter on the court of common pleas, and this chapter is liable, therefore, to the criticism which we have just made to that; but its exclusive jurisdiction is very much enlarged. Here is the whole section: —

"Chapter 114, § 2. The court shall have the same powers and jurisdiction in civil actions and proceedings in the county of Suffolk as the court of common pleas has in other counties, except that such jurisdiction shall be exclusive in all civil actions in which the damages demanded or property claimed exceed in amount or value one hundred dollars and does not exceed three thousand dollars."

"Here the words 'or property claimed,' are retained, as they should be, but the words 'civil actions,' are open to a similar criticism to that made upon 'all other civil actions,' in a former chapter. These very words have been held to include, in some connections, suits in equity; and they certainly include actions for waste and writs of entry, of both of which the supreme court has sole cognizance."

This objection to the report, so far as it relates to the concurrent jurisdiction of the court, has been answered by what has been already said respecting the objection to the concurrent jurisdiction of the common pleas. That which relates to the "exclusive jurisdiction" of the superior court requires some comment. It is said that this is "very much enlarged," and this alleged enlargement, it seems, is supposed to arise from the words, "all civil actions." "These

very words," it is said, "have been held to include, in some connections, suits in equity, and they certainly include actions for waste, and writs of entry, of both of which the supreme court has sole cognizance."

And so the reasoning seems to be that by this section exclusive jurisdiction is given to the superior court, perhaps, in some connections, of suits in equity, and certainly of actions for waste and writs of entry, of both of which the supreme court have exclusive jurisdiction.

This would be a most singular piece of legal logic if the words in question were in a grant of jurisdiction. But we will not waste time on that. It so happens that the words are in an exception, and if this exception operated to enlarge the jurisdiction of the court in the manner suggested, it would be the most remarkable exception we ever heard of. Laying aside what relates to suits in equity, which is rather indefinite, the construction of the exception by the critics would make the section read substantially after this manner: —

"The court shall have the same powers and jurisdiction in civil actions and proceedings in the county of Suffolk, as the court of common pleas has in other counties, except that such jurisdiction" [that is, the same jurisdiction which the court of common pleas has] "shall, in the superior court, be exclusive in all civil actions, (including actions for waste and writs of entry,) in which the sum demanded in damages or property claimed exceeds in amount or value one hundred dollars, and does not exceed three thousand dollars" (of which actions of waste and writs of entry the supreme court have exclusive jurisdiction, and the court of common pleas have no jurisdiction). Most wonderful exception! Most astute critics!!

We have ever understood that the office of an exception is to operate upon the matter with which it is connected, making some qualification relating to that matter; — in this case, therefore, qualifying or altering in the superior court the exclusive jurisdiction, which but for the excep-

tion that court would have, in the county of Suffolk, precisely like that which the common pleas have in other counties. In other words, providing that, of the jurisdiction given by the section in the first instance, the part which was exclusive should vary in the matter specified; — as if it had said, "except that whereas the jurisdiction of the common pleas is exclusive in all civil actions, in which the sum demanded in damages exceeds one hundred dollars, and does not exceed three hundred dollars, the jurisdiction of the superior court shall be exclusive in all civil actions in which the sum demanded in damages or property claimed exceeds in amount or value one hundred dollars, and does not exceed three thousand dollars."

But the learned critics make the exception an additional original grant of exclusive jurisdiction, beyond that of the common pleas; and not only so, but make that jurisdiction exclusive over certain matters, of which exclusive jurisdiction is by the same act given to the supreme court.

If this be to have "a perfectly nice and critical appreciation of the idioms of the English language," the commissioners may well rejoice, in not having applied such an appreciation to the execution of their task.

The existence of the partnership of Greenhorn and Grinderson, in the editorial charge of the Law Reporter, will certainly not suffice to account for this criticism. It is unmistakably the work of Greenhorn alone.

The next criticism relates to the removal of actions from the superior to the supreme court.

"Sect. 5. No action shall be removed from said court to the supreme judicial court upon application of the defendant or by consent of parties, unless the damages demanded or property claimed exceed in amount or value the sum of three thousand dollars."

The critics having quoted this section, remark upon it as follows: —

"Now, as we have seen, the only actions which can be removed from the common pleas are those in which the *ad damnum* exceeds

three hundred dollars, &c.; and if those actions in which the 'property claimed' exceed the required limit, but the *ad damnum* does not, can be removed from the superior court in this mode, it must be by an implication arising out of the language of this section, which by its terms only purports to make an exception to a grant of power; an implication which, we apprehend, would not be warranted by any sound rule of construction."

The learned critics do not venture to stake any professional reputation upon an *assertion* that the section is not sufficient; but it is somewhat amusing to observe their argument, that, if actions in which the property claimed exceeds in value $ 3,000, but the *ad damnum* is less, may be removed, it must be by an implication arising out of the language of this section, "*which by its terms only purports to make an exception to a grant of power*"; an implication which they apprehend would not be warranted.

The objection which they make is similar to the one upon which we have just exposed the absurdity of their criticism next preceding. They ignored it there, to make an attack, where the language of exception is express. They seem to have a glimmering consciousness of it here, for the purpose of another attack, although there is neither the form nor the substance of an exception to sustain it.

The most remarkable part of this criticism, however, is found in the last clause. The critics say: —

"The very sweeping language of this section, too, would seem to assert that no defendant should remove a cause by bill of exceptions or appeal; an apparent discrimination against defendants which cannot have been intended."

But the objection arises from an apparent, and an actual, want of discrimination, on the part of the critics, between removal upon application of the defendant, or by consent of parties, and removal on a bill of exceptions, or by an appeal.

Sect. 11, Chap. 113, provides for the removal of actions to the Supreme Court, by consent of parties, before trial;

Sect. 12, for a removal on application of the defendant, at the first term, &c., supported by an affidavit of defence. Sects. 14–17 provide for appeals upon matters of law after judgment; and Sects. 19, 20, for the allowance of exceptions to any opinion, ruling, direction, or judgment of the court below in matter of law, (except, &c.) in any civil action, suit, or proceeding, upon which a case may be removed. But by Sect. 21 no trial is to be prevented or delayed by the allowance of exceptions, &c. Here, then, are four classes of cases in which there may be removals, — two modes of removal before trial, and two afterwards.

The section in question provides that there shall be no removal upon application of the defendant, or by consent of parties, (two of the four classes,) except when the *ad damnum* or the value of the property exceeds a certain amount, which is precisely the law as it stands at present. The critics think that this "very sweeping language" (!) includes the other two classes. Now this not only shows that they have not that "perfectly nice and critical appreciation of the idioms of the English language," which is essential for critics, but it shows also, among divers other instances, that, in relation to this particular work, for some reason or other, they have no appreciation at all of the right use of words.

The next allegation is: —

"There are other inaccuracies in *this chapter* ["these chapters"]. Thus we find elaborate provisions, copied with too faithful accuracy from the Revised Statutes, respecting appeals from the common pleas. That the appellant shall give sureties, if required, to prosecute his appeal, etc.; that he shall file in the supreme court full copies of all the papers in the case, excepting the depositions, of which he shall take up the originals; and minute details as to entering appeals, etc.

"Now most of these details are unnecessary, some are unfair, and some are absurd."

The matter is introduced as an *inaccuracy;* — that is, as

an error on the part of the commissioners; — and then the first allegation is that they have "copied with too faithful accuracy" sections of the "refined gold" of the Revised Statutes, providing that an appellant shall recognize with sureties, if required, to prosecute his appeal, and to produce in the court above copies of the writ, pleadings, and judgment, &c., and original depositions and other evidence.

The reasons given for the objections are, that since 1840 appeals have been allowed only in matters of law; that "the mode of taking up questions of law which is now most used is by bill of exceptions"; that "it is unnecessary to make other or different regulations for entering or prosecuting appeals from those which apply to exceptions"; that "it is not fair to require a recognizance in carrying a point of law to the only court competent finally to decide it"; and that "it is absurd to require the appellant to carry up papers and copies which, when carried up, a higher court cannot possibly consider, — as the learned commissioners do when they require anything but the 'record' to be taken to the supreme court."

But it is not alleged that there has been any repeal of these provisions, as there clearly has not. It is not alleged that they are practically superseded by the change respecting appeals. They are only less necessary, perhaps. But *more or less necessary* is a question for the Legislature, and not for the commissioners; and the Legislature making the change considered the necessity for carrying up the papers sufficient to induce them to leave these provisions unrepealed.

The importance of the provisions, however, is perhaps greater than the critics suppose. The statute of 1840, allowing appeals on matters of law, provides that the supreme court may, for good cause, allow the parties to withdraw or amend the pleadings. It is quite clear, therefore, that the higher court to which the papers are carried can consider the pleadings; — and although it is provided that, if the pleadings end in an issue of fact, the

case shall be remanded to the court of common pleas, to be there tried, there seems to be nothing to prevent a submission of the case to referees, after the court have allowed the parties to withdraw their pleadings, in which case the evidence may be laid before the referees, and perhaps, after the return of the report, come under the consideration of the court, upon exceptions to it.

Moreover, as the cause, with its pleadings and written evidence, is in the supreme court by the appeal, it is quite possible, to say the least, that, if the issue of law upon which the case was appealed is removed out of the way, by a withdrawal of the pleadings, a trial by jury may be waived by consent, and the case tried by the supreme court, upon all matters of fact, under the provisions of Chapter 267, Statutes of 1857. There is no provision requiring the case to be remanded, unless after an amendment of the pleadings they shall end in an issue of fact. Perhaps the learned critics have not considered this matter as deeply as they thought they had.

The criticism then proceeds: —

"Another somewhat similar imperfection exists, as it seems to us, in that part of the chapter on the supreme court which relates to the equity powers of that tribunal."

It should be recollected that the critics were speaking of "*inaccuracies*," and an "imperfection" is not necessarily an inaccuracy. "When the same idea is to be repeated," &c. See *Elementary Observations.*

The commentary is quite too long, and too unimportant, to be copied at large. The substance of the objection is, that the commissioners have retained some specifications of the equity powers which might have been omitted. The answer is, that the commissioners found these specifications in the statutes, and they found also a subsequent general grant of equity jurisdiction in all cases where there is not a full, adequate, and complete remedy at law. The question arose, how far the enumeration of the equity

powers, found in the Revised Statutes, might be omitted, because those powers were included in the general clause.

It was readily seen that some of them might be omitted, and that some could not be; and, respecting others, there was a grave doubt to which class they belonged. The objection to omitting any of them, unless all which were included in the general clause were omitted, was palpable. The commissioners thought that the safer course was to retain them. They, however, stated their difficulty to an authority as much higher than that of the editors of the Reporter, as the authority of the latter is higher than that of a boy on the first form of a primary school; and, having followed the advice they received, are content to leave this matter to the consideration of those who can estimate the reasons for the course which they pursued, which were stated in a brief note at which the critics sneer, as "the careful and detailed opinion of the learned commissioners." They were fully aware that the Legislature could readily strike out such portions as they might deem unnecessary.

The suggestion, that, because one of these enumerated grants has been held to have only a restricted application, its insertion may operate to restrain the general words subsequently used, is a piece of captious nonsense that does not require a further reply.

They next copy a part of

"Chapter 113, § 19. A party whose motion for a new trial is overruled, or who is aggrieved by any opinion, etc. of the court in matter of law, (except upon questions arising on pleas in abatement,) in any civil action, etc., may allege exceptions thereto, which, being reduced to writing in a summary mode, and presented to the court before the adjournment without day of the term at which his motion is so overruled or he is so aggrieved, &c., shall be allowed, &c."

Upon this the critics say: —

"By the natural construction of this section any party may allege exceptions to the overruling of his motion for a new trial, although the ground of that motion be, as indeed it almost always is, in that court, one of fact, as that the verdict is against evidence, or for newly discovered evidence, etc."

And then follows a sneer respecting "this new and valuable privilege."

It is true that there is an error in this section as it stands in the body of the report. But as the critics, in the early part of their article, admit that, "in a work so laborious and so difficult, errors are to be expected, are, indeed, to a certain extent, unavoidable," it would not have required a great stretch of their imaginations to have supposed that a list of corrections might be found somewhere. Corrections accompanied the former revision, respecting which the critics should have known something. They were therefore "put upon inquiry" for such a list, which is to be found at the end of the present work, in which the error in this section is corrected.

Now one of two things is true. Either the critics saw this correction, and chose, notwithstanding, to ignore it, and ridicule the section as erroneous, — or they did not see it, which was a most insufferable carelessness in persons who, after their fashion, undertook to enlighten the public in relation to the faithfulness with which the commissioners had performed their duty. These very facetious critics may seat themselves on which horn of the dilemma they please, and laugh at Section 19 of Chap. 113 at their leisure.

They next say: —

"There are a few other discrepancies of detail in these three chapters, as in the careful and proper provision that the salaries of the judges of two of the courts shall be paid quarterly, while no such solicitude is manifested for the third; but we have found nothing requiring special comment here."

Most careful and reliable critics!! Exactly the reverse of this is true. There is no provision, in the chapter concerning the supreme court, or in that concerning the court of common pleas, for a quarterly payment of the salaries of the judges. But there is a provision in each by which the salaries are to be received from the treasury of the

Commonwealth; and, in section *thirty-one* of Chap. 15, there is a general provision that "salaries payable from the treasury shall be paid quarter-yearly, on the first days of April, July, October, and January," inserted in that chapter to avoid a multitude of repetitions.

As the salaries of the judges of the superior court are not received from the treasury of the Commonwealth, but from that of the city of Boston, a "careful and proper provision" that these salaries should be paid quarterly was inserted in the chapter concerning that court.

The critics next turn to the chapter concerning certain rights and liabilities of husband and wife, formed in a great measure from recent acts of the Legislature, making marked changes in the law relating to married women, the operation of which in all their bearings cannot readily be foreseen. They extract

"Ch. 108, § 1. The property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, that which she acquires by her trade, business, labor, or services, carried on or performed on her sole and separate account, that which a woman married in this State owns at the time of her marriage, and the rents, issues, profits, and proceeds, of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her, in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts."

The first commentary is: —

"Upon this section we must remark that brevity seems to us to have been consulted at the expense of clearness. Its language, down to the word 'account,' applies literally and properly only to women already married, and the whole clause therefore excludes women who may be hereafter married, from the benefit of receiving or acquiring, in any manner, while married, any separate property. Two words would have removed this difficulty."

We answer that two words are not necessary to remove the difficulty, because there is no difficulty. The language of the section down to the point mentioned does not apply

only to women already married, and does not, therefore, exclude women who may be hereafter married, from the benefits mentioned. The first part of the clause may be confined to women now married, because it relates only to the property which any married woman now owns; but in what follows, the pronouns *her* and *she* refer to "any married woman," and apply to all cases hereafter; the indicative present being as well adapted for that purpose as any other mode and tense.

They next say: —

"A captious critic might add" (and so they proceed to add) "that the second clause of this paragraph seems to be aimed [?] at one married woman only, though at which one in particular is not so clear. Sancho Panza said, there was but one good wife in the world, and every fool thought he had her. Probably the learned commissioners consider it sufficient to legislate for that model woman, trusting to the general application of their singular precepts."

The learned critics are ill to please. They allege against the commissioners that they have put the indefinite *a* for the definite *the;* and the second of the elementary observations on language to which they kindly make the learned commissioners quite welcome is, "The indefinite article is not adapted to the designation of a definite object." And yet the learned critics, in the exuberance of their fancy, here give the indefinite *a* the definite application.

How this section should be constructed, they are not kind enough to inform us; but as it is quite clear that the indefinite *a* is, in this connection, equivalent to the distributive *any* or *every*, and just as good, with the merit of being shorter, the inference is that the critics insist that the definite *the* should have been used, so that the clause would read "that which *the* woman married in this State owns," and then their story about Sancho Panza would have been more appropriate.

Another objection to this chapter is found in the allegation, that the portions of Chapter 208, Statutes of 1845,

found in sections *twenty-seven* and *twenty-eight*, are "now obsolete." We doubt the authority of the critics to say that. They do not allege that these portions are expressly repealed, or superseded by the substitution of some other provision. They may be disused "in chambers," but that does not make them *obsolete*.

The remaining matter to which specific exception is taken, is the first part of

"Sect. 8. A married woman having separate property, may be sued for any cause of action which originated against her before marriage, and her property may be attached and taken on execution in the same manner and with the same effect as if she were sole."

The first commentary is: —

"This clause is not found in the act of 1857, which related principally to women already married, but is copied from two earlier statutes, both of which were applicable chiefly to women thereafter to be married."

There are two blunders in this statement of four lines. The part of the section cited is copied from, or rather is a revision of, but one statute. (See Sect. 5, Chap. 208, Statutes of 1845.) And the provisions of that chapter were not applicable chiefly to women thereafter to be married. The first and second sections contain provisions regarding ante-nuptial contracts, which apply of course to women thereafter to be married. If the critics had looked beyond these sections they would have found that the remaining sections, eight in number, relate to any married women. But the fifth section, authorizing suits against married women, if strictly interpreted, is perhaps confined to cases where a woman holds property conveyed, devised, or bequeathed to her, under the provisions of that act. As this was, however, the first of the acts expressly authorizing women so to hold property, the principle of the provision contained in that section, making a woman so holding property "liable to be sued in law and in equity," "upon any contract by her made, or wrong by

her done before her marriage, in the same manner and with the same effect as if she were unmarried," seems at this day to be applicable, whether the property has been acquired under the provisions of that or of any other act of the same class.

The Legislature will probably have the benefit of the "very substantial limitations and exceptions" which the learned editors would *advise* should be introduced "into this brief and sweeping enactment."

The learned critics ask divers questions respecting the effect of portions of this chapter. It is quite probable that they may desire some information upon what even they confess is a difficult subject. When they specify any further charges against the chapter, they may perhaps obtain an answer, if the case seems to require one.

And now having finished our examination of the specific objections to the several chapters which the critics profess to have examined, we turn to the general objections stated in the early part of the article, respecting the use of the plural and singular, &c.

The critics should have read the third chapter of the work which they attempt to criticise, even if they did not suppose that to be the one in which they could find the greatest number of errors. If they had done so, they would have found the second rule for the construction of statutes, part of which is: "Words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular." What objection exists to declaring "two or more mortgagors to be the owners of real estate until one mortgagee takes possession, when he becomes the owner," the critics have not been so kind as to inform us. Whether the objection is to the use of the plural and singular, or to the use of the definite article, or both, we are left in doubt. Certainly there may be two or more mortgagors, and one mortgagee, who, when he takes possession, becomes a very definite object.

But "the indefinite *a*"! — We admit there is no rule, in chapter three, covering the use of the indefinite *a*; and we fear we shall not convince the very learned critics. It is one of the constitutional principles of mutual admiration societies to magnify the merits of all the members of the clique, and to see no worth beyond the pale of the association. And in like manner there are a few young men, we hope mostly among the clerks in the shops which retail small wares, who think that Boston comprehends "all creation"; some of them admitting, however, that Massachusetts constitutes the suburbs of that city. The very learned critics seem to have trained themselves as critics in that kind of school. They have evidently come to the conclusion that the Revised Statutes (*passed*, they say, in 1836) are the perfection of human reason; and there is no particular evidence, in the article, that they are aware that there are any other statutes in the world; if indeed they have, for the purpose of considering the merits of the statutes of Massachusetts, any notion that there is any world beyond the limits of the Commonwealth, except perhaps "another State," the existence of which they admit from the fact that the chairman of the commissioners once resided there. If, as critics of statute literature, they had been aware that there is a place called the State of Maine, they might possibly upon inquiry have learned that the statutes of that State have been recently revised; that commissioners appointed for the purpose made a report, which was committed to Mr. Chief Justice Shepley, late of the supreme bench of that State, for farther revision, after which his report was considered and adopted by the Legislature. And upon looking into the statute-book, prepared with all this care, they would have found

Ch. 119. Containing nine sections. §§ 1, 2, 3, commence with "Whoever wilfully and maliciously sets fire," &c. §§ 4 and 5. "Whoever wilfully and maliciously burns," &c. § 7. "Whoever breaks and enters," &c. § 8. "Whoever with intent," &c. This formula is uniform, or nearly so, in all the chapters on crimes.

Ch. 6, § 115. "Such treasurers" (state, county, town, and parish) "may make out their warrants directed to a coroner of the county, when a sheriff or deputy is deficient as aforesaid," &c.

Ch. 11, § 12. "Towns may make such by-laws, &c., and may annex a suitable penalty, not exceeding twenty dollars, for any breach thereof." § 13. "Such towns shall appoint, at their annual meeting, three or more persons, who alone shall make complaints, for violations of said by-laws, to the magistrate having jurisdiction thereof by said by-laws, and execute his judgments."

Ch. 18, § 42. "Surveyors shall give reasonable notice, and in writing if required, to each person on his list, resident in town, of the amount of his tax," &c. "The tax may be paid to the surveyor in money," &c. § 51. "Towns may raise money for the repair of bridges and ways, and direct the same to be assessed and collected as other town taxes, to be expended for the purpose by the selectmen, or by road commissioners, as the town directs."

Ch. 4, § 23. "When at a town meeting," &c. § 51. "If the selectmen of a town or assessors of a plantation wilfully neglect," &c.

Ch. 11, §§ 1 and 4. "A town at its annual meeting," &c. § 3. "A town containing," &c. § 7. "A town raising," &c. § 9. "A town may choose," &c. § 23. "A district may choose," &c. Ch. 14, § 26. "A town may establish," &c. § 34. "A town may choose," &c. § 32. "When a householder or physician knows that a person under his care is taken sick of any such disease, he shall immediately give notice thereof to the municipal officers of the town where such person is, and if he neglect it, he shall forfeit not less than ten, nor more than thirty dollars."

According to the critical notions of the Reporter, we must suppose that, when some one householder or physician has given this notice, the section will have accomplished its object and will be no longer in force.

Ch. 2. Library, § 19. "Moneys appropriated for its use are to be expended," &c.

Ch. 11, § 76. "The presidents of colleges in this State are removable at the pleasure of the trustees and overseers whose concurrence is necessary for their election."

Ch. 18, § 28. "Plantations required to assess a state or county tax have the like powers and are subject to the like liabilities and penalties as towns respecting ways." § 45. "Each surveyor at the expiration of his term is to render to the assessors," &c.

Ch. 19, § 10. "Teams with wheels, &c. must have the rims of their wheels," &c. "And no team drawn by more than six horses is allowed to travel on them." "The owner or driver of a team violating this provision forfeits twenty dollars," &c.

Ch. 1, § 4, Clause 7. "The word inhabitant means a person having an established residence in a place."

These specimens may serve to show how the people of Maine, who are so unfortunate as to have no "Law Reporter" within their borders, have been left to construct their statutes. Unsuspicious people! They cannot be aware what a set of laws they are living under. If perchance a copy of the January number of the Boston periodical has been sent to that State, we hope it will not fall into the hands of the governor; for if it should, it may stir him up to such a sudden flood of apprehension, that he will incontinently call the Legislature together to provide for the public safety, by a new revision of the statutes, which shall restore all the old forms of statute phraseology, stay the farther progress of attempts at brevity and improvement, and insure the reign of a wise conservatism in the making of statutes, until the number of the Law Reporter for January, 1859, and his message founded thereon, shall have been forgotten.

We have no expectation that these references to the statutes of Maine can change the opinion of the learned critics respecting the "idiomatic English" of the present revision. On the contrary, the fact that the formulas are made more uniform in this revision than in the statutes of Maine, will probably only serve to make the matter with them more objectionable.

Respecting "the present tense of the indicative, in place of the future and the subjunctive," we shall not rest the case of the commissioners upon the statutes of Maine. The considerations above adverted to serve to show that any defence founded on them may be swept away by an extra session. We shall therefore produce a better witness. If the reader will turn to the statute-book of Massachusetts for 1858, — (he may take the Blue Book, so called, or the cheaper edition furnished to towns, or the supplement, for that year, to the Revised Statutes, edited by

Horace Gray,) — he will find chapter one hundred and fifty-four : —

" An Act in Relation to the Crime of Murder.

" *Be it enacted, &c., as follows:*

" Sect. 1. Murder committed with deliberately premeditated malice aforethought, or in the commission of an attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree.

" Sect. 2. Murder not appearing to be in the first degree is that in the second.

" Sect. 3. The degree of murder is to be found by the jury.

" Sect. 4. Whoever is guilty of murder in the first degree shall suffer the punishment of death for the same, subject, however, to such conditions, regarding the time and manner of executing sentence, and the custody or imprisonment of the convict prior thereto, as shall have been otherwise provided by law.

" Sect. 5. Whoever is guilty of murder in the second degree shall be punished by imprisonment in the state prison for life.

" Sect. 6. Nothing herein shall be construed to require any modification of the existing forms of indictment.

" Sect. 7. This act shall take effect from and after its passage."

That is the whole of it, with its present tense of the indicative, instead of the future and the subjunctive, and with " Whoever " instead of " When any person shall," or " Every person who," or " If any person."

That act, it is understood, was introduced by a jurist and scholar, who is generally supposed to have "a sufficient practical knowledge of the present state of our statute law," " a perfectly nice and critical appreciation of the idioms of the English language," and the ability to express his ideas accordingly. The form of expression which is appropriate in a statute imposing the highest penalty known to the law may perhaps be admissible in other cases.

We shall not enter into an argument to show that the word " town " alone will not answer all the purposes for which the commissioners have used the word " place," nor upon the propriety of the use of the latter word. This same " awkward and quite inexact word," " place," is a part of the refined gold. See Revised Statutes, Chap. 7, Sect. 30;

Chap. 28, Sect. 127; Chap. 39, Sects. 26, 37; Chap. 46, Sects. 13, 19, 20. It is also used in the very sense in which the commissioners have used and explained it, by

Mr. Chief Justice Parsons, in Granby *v.* Amherst, 7 *Mass. Rep.* 1;

Mr. Justice Parker, in Putnam *v.* Johnson, 10 *Mass. Rep.* 498; also in Harvard College *v.* Gore, 5 *Pick.* 369;

Mr. Justice Wilde, in Jennison *v.* Hapgood, 10 *Pick.* 77; also in Greene *v.* Greene, 11 *Pick.* 410;

Mr. Chief Justice Shaw, in Lyman *v.* Fiske, 17 *Pick.* 231 (three times); also, in Abington *v.* North Bridgewater, 23 *Pick.* 170 (thirteen times); also, in Thorndike *v.* City of Boston, 1 *Met.* 242; also, in Sears *v.* City of Boston, 1 *Met.* 251 (twelve times); also, in Stevens *v.* Boston and Maine Railroad, 1 *Gray*, 281; also, in Buckley *v.* Inhabitants of Williamstown, 3 *Gray*, 493 (five times);

Mr. Justice Metcalf, in Mead *v.* Inhabitants of Boxborough, 11 *Cush.* 362; also, in Nutting *v.* Connecticut River Railroad, 1 *Gray*, 502 (three times);

Mr. Justice Fletcher, in Fitchburg *v.* Winchendon, 4 *Cush.* 190 (three times); and by

Mr. Justice Merrick, in Lee *v.* City of Boston, 2 *Gray*, 484.

So used also in the opinion of the Justices signed by Mr. Chief Justice Shaw and Justices Wilde, Dewey, and Hubbard, 5 *Met.* 586 (twelve times).

Furthermore, we have State Reporter *v.* Law Reporter. This "awkward and inexact word *place*," the position of which "in idiomatic English may be said to be nowhere," is used by Mr. Reporter Gray (without the excuse that it is to rid himself *also* of the awkward repetition of "city or town") in making up his abstracts. See 1 *Gray*, 277; *Ibid.* 502, before cited; also, Lexington and West Cambridge Railroad *v.* Staples, 5 *Gray*, 520. Thus it appears that Mr. Reporter Gray does not write "idiomatic English," and that parts of his abstracts are "nowhere." But Mr. Reporter Gray approves of the criticism upon the

report of the commissioners, kisses the rod which flogs him over their shoulders, and blesses the Law Reporter; and the Law Reporter says, in a notice of 5th *Gray*, in which the last offence was committed, "Mr. Gray's Reports are uniformly well done."

But we have an authority which may be more satisfactory to the Law Reporter. In the argument for the plaintiff, found in Lee *v.* the City of Boston, 2 *Gray*, 484, it is said, the "plaintiff's domicile was in Brookline on the first of January, 1853. That was the *place* of his principal occupation"; — "for the purposes of taxation, every one resides, or has his residence in, or is an inhabitant of, that town or *place* where he has his legal domicile"; — "for every one is still to vote in the city or town of his domicile, which is the *place* appointed by the constitution." The argument was made by John Lowell, senior editor of the Law Reporter, and was reported, probably from his notes, certainly by Mr. Gray; "and Mr. Gray's reports are uniformly well done."

The question remains, Which is "nowhere," the awkward and inexact word "*place*," or the very silly criticism which objected to the use of it? and that question we leave to the decision of our readers.

We have referred already to the sneers respecting "the verbal critics of the revised statutes," and to the paragraph in which the sneerers "see cause to regret that the learned commissioners had not devoted to the careful reconstruction of these laws" (laws passed since 1836) "a considerable part of the great labor which they have expended in gilding the refined gold of the Revised Statutes."

This part of the subject demands some further consideration. We are among those who have had all reasonable regard for the Revised Statutes. The gentlemen who acted as members of that commission were very learned jurists, for whom while living, and for whose memory when dead, we have entertained the highest respect. We would utter no word of them except in deserved eulogy. We should

no more think of publishing to the world, that in the execution of their work they committed "extraordinary blunders," than we should think of committing any other imaginable injustice and impertinence. That they discharged their duty faithfully, and we are pleased to add acceptably, there seems to be no doubt. To anything in the way of commendation of their labors, involving no invidious comparison, we should by no means be disposed to add a qualification; but the very sagacious editors of the Law Reporter have seen fit to put the matter otherwise. And while we should have been among the last to challenge a comparison between the report of 1835 and that of 1858, when the comparison is challenged with taunts and sneers, we see no reason why it should not be met fairly and frankly.

We say, then, in the first place, that the duty of revision which devolved upon the first commission was not so arduous as that which devolved upon the commission whose labors have recently terminated. It is true that the period of time embraced within the scope of their labors was longer. But they had the advantage of the compilation, completed in 1822, by two gentlemen who now occupy seats upon the bench of the Supreme Court of the Commonwealth, and who are widely known as among the most distinguished jurists of the United States. This compilation presented, in a compact form, the state of the statutes as existing about twelve years before the labors of the commission began, showing what was then in force and what repealed. The subsequent legislation had not been voluminous, nor had it made great changes. And the legislation of the whole period had been generally of a simple character, and readily understood. Their labor of arrangement may perhaps be regarded as greater, but the whole construction of the arrangement found in the Revised Statutes was by no means an original work of the commissioners. They say in their report that "they naturally directed their attention to the elaborate and valuable

code lately adopted by the State of New York"; — that "it was thought to be in many respects sufficiently well adapted to the purposes of a systematic digest of the statute law of our Commonwealth; and its general plan has accordingly been kept in view in the present revision." For the purposes of citation and reference it was not deemed convenient. That the commissioners derived aid in the arrangement of their chapters from the index to the compilation of 1822, is apparent upon a cursory examination. That commission introduced into the statutes many new provisions. What proportion of them were derived mainly from the common law may be seen by an examination, and we need hardly say that it is easier to prepare such new provisions than it is to reconstruct from complicated statutes already passed. That the work which they performed was greater than was originally anticipated, we may be assured, from the fact that the Legislature, at the January session of 1834, appointed a committee to receive their report when completed, and examine it; which committee were never called together, because the report was not in readiness that year. Governor Davis, in his address to the Legislature at the January session of 1835, alluding to the delay, said: "The labor of the commissioners must have been arduous and perplexing; and the delay in making the report should be viewed only as a proof of their anxiety to bring their work to a mature form."

The commissioners who made the report of 1858 had the arrangement and plan of the Revised Statutes for the basis of their work, and thus were saved a portion of not the most difficult duty. But there was still no small amount of labor of that character devolving upon them. Many new chapters were required by the subsequent legislation, and it must not be forgotten that it was necessary to revise the whole body of the Revised Statutes, as well as the subsequent legislation, because large portions of those statutes had been repealed or modified,

sometimes by express enactment, but more often by legislation more or less inconsistent with their provisions. For these and for other reasons, it was important, and sometimes necessary, to rearrange the matter of many of the chapters. The quantity of matter to be revised was much greater, and although notes and references were to be found, there was no intermediate compilation, like that of 1822, to facilitate the work. We need only add, which is perhaps the most significant fact, that the legislation of the last eight years has introduced greater changes of principle, as well as of detail, than that of any similar period, — perhaps greater than that of any period of three times the extent, — and we have said enough to make good the assertion with which we started, that the duty of revision which devolved upon the first commission was not so arduous as that which devolved upon the last.

Next we say, and we do it with no desire to abate anything from the well-earned reputation of that commission, that the committee of the Legislature who revised their work, and who were authorized to report new provisions, reported one hundred and seventy pages of amendments, a great number of them of a verbal character. How many a similar committee will report on the present revision remains to be seen. If the editors of the Law Reporter, or their colaborers in the work of emendation, are to prepare them, in the spirit and after the manner of their work thus far, the proposed amendments will doubtless be much more numerous, and of much less importance.

We wish to say no more of the "refined gold," purified in the crucible of the legislative committee in 1835, than that any one who enters upon a critical examination and study of it, will very soon admit that the recent commission did not err in supposing that some improvement might be made in the arrangement of the matter of the different chapters, and also in the phraseology.

The learned critics say of the work : —

"In point of style, it has always appeared to us to be as nearly perfect as human infirmity is likely to permit, though erring a little, perhaps, on the side of a prudent redundancy of expression."

They are doubtless in favor of a composite style, as there are in the Revised Statutes at least three different styles of composition. We say it not by way of reproach. The fact is readily accounted for, when we consider that it is the work of three or four persons, probably laboring separately in the preparation of the different chapters.

These are some of the facts to be taken into consideration in making a comparison between the labors of the two commissions. But without these, let the two reports be placed side by side, and if the present report will not compare favorably with that which preceded it, either in the precision and accuracy with which the rules of law are stated, the arrangement of the matter, or the general style and finish of the work, let it be rejected.

Nay, more; let this comparison be made between the present report and the report of the former commission, corrected as it was by the committee of the Legislature, and passed to be enacted, — with the refined gold of the Revised Statutes; — and if the former cannot stand the test in all the particulars before mentioned, let it be rejected.

The American Jurist, the Law periodical of that day, inserted a notice of the report of 1835; and if the editors of the Law Reporter had been half as learned, and wise, and courteous, as their predecessors of a former age, we should have been spared this comparison.

Perhaps we ought to add a few specimens of the gold and of the gilding, that the fineness of the one and the application of the other may be seen.

R. S., Chap. 15, Sect. 24. "If by reason of death, resignation, or removal from town, a major part of the selectmen originally chosen in any town shall vacate their office, those who remain in office shall have the same power to call a town meeting, as the whole number first chosen would have had."

Revision, Chap. 18, Sect. 25. "If by reason of death, resignation, or removal from town, a major part of the selectmen thereof originally chosen shall vacate their office, those who remain in office shall have power to call a town meeting."

R. S., Chap. 15, Sect. 26. "At all the town meetings, except those held for the election of governor, lieutenant-governor, senators, representatives in the general court, representatives in congress, electors of president and vice-president of the United States, and county commissioners, a moderator shall be first chosen."

Revision, Chap. 18, Sect. 26. "At every town meeting, except for the election of national, state, district, and county officers, a moderator shall first be chosen."

R. S., Chap. 15, Sect. 36. "Whenever *neither the assessors, nor the selectmen*, chosen by any town, shall accept the trust, or, having accepted it, *shall not perform the duties* thereof, the county commissioners may appoint three or more suitable persons within the county, to be assessors of taxes, for such town; and the assessors, so appointed, shall have the like powers, and be subject to the like duties, and receive the like compensation, as assessors chosen by the town.

"Sect. 37. In case of such neglect to choose selectmen or assessors, the county commissioners may appoint three or more assessors for such town."

Revision, Chap. 18, Sect. 37. "If a town neglects to choose selectmen or assessors, or if the persons chosen do not accept the trust, or having accepted it shall not perform the duties, the county commissioners may appoint three or more suitable persons within the county, to be assessors of taxes for such town; who shall have the powers, perform the duties, and receive the compensation, of assessors chosen by a town."

R. S., Chap. 15, Sect. 40. "If any person, so chosen and summoned, and not exempted by law from holding the office to which he is elected, shall not, within seven days, take the oath of office, before the town clerk, he shall, unless the office to which he is chosen shall be that of constable, or some other for which a different penalty is provided, forfeit the sum of five dollars, to the use of the town; provided, always, that every such person, who shall take the oath of office, before a justice of the peace, and file a certificate thereof, under the hand of such justice, with the town clerk, within the said space of seven days, shall be exempted from said penalty."

Revision, Chap. 18, Sect. 41. "If a person so chosen and summoned, who is not exempt by law from holding the office to which he is elected, shall not within seven days take the oath of office before the town clerk, or before a justice of the peace and file with the town clerk a certificate

thereof under the hand of such justice, he shall, unless the office to which he is chosen is that of constable or some other for which a different penalty is provided, forfeit five dollars."

R. S., Chap. 15, Sect. 29. "The treasurers of towns may, in their own names and official capacities, prosecute any suits upon bonds, notes, or other securities, given to them or to their predecessors in office."

Sect. 63. "The treasurers of towns, in all cases, where no other provision is specially made, shall prosecute for all fines and forfeitures, which may enure to the use of their towns, or of the poor thereof."

Revision, Chap. 18, Sect. 56. "He may in his own name and official capacity prosecute suits upon bonds, notes, or other securities, given to him or his predecessors in office, and where no other provision is specially made, shall prosecute for all fines and forfeitures which may enure to his town or the poor thereof."

R. S., Chap. 15, Sect. 75. "Every constable may, in the execution of a warrant or writ duly directed to him, convey, beyond the limits of his own town, as well any prisoners as things, in his custody under such process, either to the justice who issued it, or to the common jail or house of correction of the county, of which such constable is an inhabitant."

Revision, Chap. 18, Sect. 70. "A constable in the execution of a warrant or writ directed to him, may convey beyond the limits of his town, prisoners and property in his custody under such process, either to the justice who issued it, or to the common jail or house of correction of his county."

R. S., Chap. 15, Sect. 84. "In case any town shall be sentenced to pay a fine, for a deficiency in the highways or town ways within the same, the surveyor, within whose limits such deficiency may be found, shall be liable to the town for the amount of such fine and all costs of the prosecution, to be recovered by the town in an action of the case, provided such deficiency exist through the fault or neglect of such surveyor."

Revision, Chap. 18, Sect. 79. "If a town shall be sentenced to pay a fine for a deficiency in the highways or town ways therein, any surveyor through whose fault or neglect such deficiency existed, shall be liable for the amount of such fine and all costs, to be recovered by the town in an action of tort."

R. S., Chap. 15. See act of amendment, Sect. 88. "When any city or town shall be required to enter into a recognizance, the mayor and aldermen of the city, or the selectmen of the town, may by an order or vote authorize any person to enter into the recognizance in the name and behalf of the city or town, and such recognizance shall be binding on the city or town, and on the inhabitants thereof, like any other contract lawfully made by such corporation.

"Sect. 89. No surety shall be required in any recognizance of a city or town."

Revision, Chap. 18, Sect. 19. "When a town is required to enter into a recognizance, the selectmen may by an order or vote authorize any person to enter into the recognizance in the name and behalf of the town, and it shall be binding like any other contract made by such town. No surety shall be required in such recognizance."

R. S., Chap. 16, Sect. 6. "The ordering, governing, and repairing of any work-house, erected or provided at the joint expense of two or more towns, and the appointing of a master and necessary assistants, as well as the power of removing them from their respective offices and trusts for misconduct, incapacity, or other sufficient cause, shall be vested in a joint board of directors, who shall, from year to year, be specially chosen by the several towns, at their annual meeting."

Revision, Chap. 22, Sect. 6. "The ordering, governing, and repairing of such house, the appointment of a master and necessary assistants, and the power of removing them for misconduct, incapacity, or other sufficient cause, shall be vested in a joint board of directors, who shall be chosen annually by the several places interested."

R. S., Chap. 18, Sect. 7. "In case the pulling down or demolishing of any house or building, by directions of the firewards or other officers aforesaid, shall be the means of stopping the said fire; or if the fire shall stop before it come to the same, then every owner of such house or building shall be entitled to recover a reasonable compensation therefor from the town; but when the building, so pulled down or demolished, shall be that in which the fire first began and broke out, the owner thereof shall receive no compensation therefor."

Revision, Chap. 25, Sect. 5. "If such pulling down or demolishing of a house or building shall be the means of stopping the fire, or if the fire shall stop before it come to the same, the owner shall be entitled to recover a reasonable compensation from the city or town; but when such building shall be that in which the fire first broke out, the owner shall receive no compensation."

R. S., Chap. 18, Sect. 8. "In any such case of fire, if any person shall purloin, embezzle, convey away, or conceal any furniture, goods or chattels, merchandise or effects of the inhabitants whose houses or buildings shall be on fire or endangered thereby, and shall not, within two days, restore or give notice thereof to the owner, if known, or, if unknown, to one of the firewards or selectmen of the town, the person so offending shall be deemed guilty of larceny and be punished therefor, as is provided in such case in the one hundred and twenty-sixth chapter."

Revision, Chap. 24, Sect. 8. "Whoever shall purloin, embezzle, convey away, or conceal, any furniture, goods or chattels, merchandise or effects,

of persons whose houses or buildings are on fire or endangered thereby, and shall not within two days restore or give notice thereof to the owner, if known, or, if unknown, to one of the firewards, mayor and aldermen, or selectmen, of the place, shall be deemed guilty of larceny."

R. S., Chap. 19, Sect. 19. "Each town shall, at its own expense, and in such places therein as the inhabitants shall direct, maintain one or more sufficient pounds, in which swine, sheep, horses, asses, mules, goats, and neat cattle, may be restrained and kept for the causes mentioned in the one hundred and thirteenth chapter.

"Sect. 20. Every town, that shall, for the space of three months, neglect to provide or maintain a sufficient pound, shall forfeit the sum of fifty dollars, to the use of the county in which such town is situated."

Mem. The use was changed by Chap. 272, Statutes of 1848.

Revision, Chap. 25, Sect. 18. "Each city and town shall, at its own expense, and in such places therein as the city council of the city, or the inhabitants of the town, shall direct, maintain one or more sufficient pounds. A city or town that shall, for three months, neglect to provide or maintain a sufficient pound, shall forfeit fifty dollars."

R. S., Chap. 28, Sect. 62. "If any chocolate manufactured in this state shall be offered for sale, or be found within the same, not being of one of the qualities described in the two preceding sections, and marked as therein directed, or, if any such chocolate shall be put on board any vessel or carriage of conveyance, for the purpose of being transported out of this state, the same may be seized and libelled, according to the provisions of the one hundred and eighteenth chapter, concerning the seizing and libelling of forfeited goods; and for that purpose, any justice of the peace may, upon complaint made to him, issue his warrant, directed to any sheriff, deputy sheriff, or constable, requiring them respectively to make such seizure; and if upon the trial it shall appear that the seizure was lawful, the said chocolate shall be deemed to be forfeited, and shall be sold and disposed of, according to the provisions of the same chapter."

Revision, Chap. 49, Sect. 21. "If any chocolate manufactured in this state shall be offered for sale or found within the same, not being of one of the qualities described in the two preceding sections and marked as therein directed, or if any such chocolate shall be put on board of any vessel or carriage of conveyance for the purpose of being transported out of this state, the same shall be forfeited and may be seized and libelled."

Note to this section, at the end of the chapter: "The Commissioners have omitted the special provisions respecting libelling chocolate, leaving it to the general rule prescribing proceedings in relation to forfeited goods."

R. S., Chap. 39, Sect. 76. "Every railroad corporation shall be liable, as well to the owners of the lands first taken, as to the owners of those

taken for making such variations, for all damages occasioned by taking the same; and the said owners shall have the same remedies, for securing and recovering payment of said damages, as are provided in other cases under this chapter."

Revision, Chap. 63, Sect. 39. "Every corporation shall be liable to the owners of lands taken for making such variations, for all damages occasioned by taking the same, to be recovered in the manner hereinbefore provided for recovering such damages."

R. S., Chap. 39, Sect. 86. "If any horse or other beast shall be *found* going at large, within the limits of any railroad, after the same is opened for use, the person, through whose fault or negligence such horse or other beast shall *be so found*, shall, for every such offence, forfeit a sum not exceeding twenty dollars, for every horse or other beast so found going at large, and shall also be liable for any damages thereby sustained by any person, to be recovered in an action on the case, by the person sustaining such damages."

Mem. If this section had been found in the Revision, the learned critics might perhaps have made themselves merry over a suggestion that the commissioners had imposed the penalty upon the person through whose neglect the horse was found; and not upon the person through whose neglect he was going at large.

"Revision, Chap. 63, Sect. 103. The person through whose fault or negligence, a horse or other beast shall go at large within the limits of a railroad after it is opened for use, shall for every such offence forfeit a sum not exceeding twenty dollars, and shall also be liable for any damages thereby sustained by any person, to be recovered in an action for tort."

These extracts, taken principally from Chapter 15, R. S., and Chapter 18 of the Revision, present, in the main, fair specimens of what the learned critics are pleased to denominate "gilding the refined gold of the Revised Statutes." Whether the operation has not been rather the removal of small particles of alloy, let the reader judge. We regret that we have been obliged to say thus much respecting the Revised Statutes. We have no intention of treating the commissioners who reported them with the slightest disrespect. They performed an onerous and difficult duty, in a manner to entitle them to the respect and gratitude of their contemporaries, and of posterity. But the Revised Statutes may well exclaim, "Save us from incompetent and injudicious friends."

This sneer about gilding the fine gold is suggestive. The spirit with which this attack has been made is quite remarkable. The war is commenced ostensibly for the public good. But the public good had no occasion to object to the revision in this sneering and captious manner. Public good is a courteous person, who could have stated any objections which he had to the report in terms of decent civility, such as are fit to be used by one gentleman towards another. Public good would have contented himself with stating his objections to the commissioners or to the Legislature, in order that such errors as he supposed he had discovered might be corrected, and not have spent his money in printing and distributing extra copies of a virulent attack upon the commissioners and the report, in order to excite a prejudice. He is evidently put in the front rank as a cover for some other personage who is slyly fighting behind in his name. The inquiry naturally arises, who is this party who is so keen for the attack, that he is willing to furnish the sinews of war, — the material aid, — and is not very particular in the choice of his missiles.

"*The refined gold of the Revised Statutes!*" *Aha!* Somebody is the proprietor of certain stereotyped plates of the Revised Statutes; very useful, of course, in the multiplication of copies of those statutes, but worth very little more than type metal whenever a revision shall be made. And there is a Supplement prepared each year to correspond in form with the Revised Statutes, containing head and marginal notes to the several chapters, and some references. The Supplements are entered for copyright. Copies are, probably, on hand, or the Supplements are stereotyped. Now it is quite clear that this somebody is interested against the adoption of the revision, can afford to spend some money to prevent it, has friends, and can do them a good turn in some way for any services which shall throw discredit upon the work of the commissioners, even if that discredit does not end in rejection, but only

in delay. The idea that the work, although valuable in the main, is full of small errors, with some extraordinary blunders, and that a long period must be required for its examination, may be useful, even if the idea that it is to be rejected as an abortion from which no good can come, must be abandoned. And this matter of interest may serve to explain how it is, that the revision, if rejected, might be so very valuable; which at first seemed somewhat marvellous. If it could be rejected, the Revised Statutes and the Supplements thereto still remain as the means of bringing in the refined gold to those interested. At the same time this rejected revision might be very useful to lawyers who practise "in chambers," enabling them the more readily to investigate and ascertain the true state of the statute law on a given subject; for which town, city, and other officers, and the people at large, who have no copies, must pay, when they seek advice. We have not the remotest idea that honorable gentlemen of the Bar will sustain any such pettifogging notion, if it exists. We make no charge that these things are so; we only say that the supposition furnishes a solution to some things, the explanation of which is not otherwise apparent.

The editors of the Reporter say, "We have taken five or six chapters of the work" (which they specify) "and given to them a thorough and careful consideration. We have no reason to suppose that these chapters are other than a fair specimen of the whole work." They selected their chapters, which are among the most difficult, and "*we* have no reason to suppose" they intended to select the best specimens. This examination of their objections shows that in their five or six chapters they found one error, of very little importance. The report contains one hundred and eighty-three chapters. At this rate there should be, in the whole report, about thirty small errors, which will affect nobody injuriously. Did not the critics make a mistake in their selection? We think this "too low a figure." If their labors furnish a fair specimen, Bassanio's remark

respecting Gratiano's reasons might be applied in a reversed form, as thus : — The commissioners' errors are, two grains of chaff hid in two bushels of wheat; you shall search all day ere you find them, and when you have them they are not worth the search.

"Now we would respectfully ask the learned" critics whether it would not have been quite as well if their article had read as follows : —

Revision of the Statutes of Massachusetts.

We have examined a few chapters of the report of the commissioners, and find two places in which the words "property claimed" are omitted. In one the omission is of no importance. In the other it may possibly affect a few cases, but it is practically of very little consequence.

Such a paragraph would probably have damaged the report, in the end, just about as much as the eighteen pages which they have devoted to the subject; and would have injured their reputation as critics, and that of their journal, much less.

Some of our readers may think that this reply is unnecessarily minute, and that parts of the foregoing pages are somewhat — particular. They would be so, undoubtedly, were it not for the character of the article which has given rise to them. Our object has been to defend the work of the commissioners, assailed in what was designed to be a contemptuous, but degenerated into a contemptible manner; and furthermore, to show that the critics have no sufficient qualification for the task they have undertaken, and that the conceit and pretension which led them to make the commissioners welcome to a few elementary observations on language, to accuse them of extraordinary blunders, and to sneer at different portions of their work, might quite as well have been exhibited in some other drawing-room.

THE

DOMESTIC AND FOREIGN RELATIONS

OF THE

UNITED STATES.

By JOEL PARKER.

CAMBRIDGE:
WELCH, BIGELOW, AND COMPANY,
PRINTERS TO THE UNIVERSITY.
1862.

MEMORANDUM. — The substance of the first part of the following Tract was contained in a Lecture delivered to the students in the Law School of Harvard College, by the author, as Royall Professor of Law in that Institution, on the 25th of June, 1861. Subsequent events have led to an enlargement of it, and to its publication in the January number of the North American Review. It is now issued as a separate Article, a single paragraph being omitted because it was little more than a repetition of what was expressed elsewhere, and some Notes being added in an Appendix.

CAMBRIDGE, *January* 1, 1862.

THE DOMESTIC AND FOREIGN RELATIONS

OF THE

UNITED STATES.

It may be stated as a result of our examination of the alleged Right of Secession, that the people of the several States composing the United States, under the Constitution, — whether that instrument be regarded as an organic law, or as a compact, — form an entire Nation, for the purposes for which they are thus united; while under their State organizations they exercise many powers of sovereignty, of a political and municipal character, some of which are subordinate to the powers of the General government, and others independent of that government because they do not fall within the scope of the purposes for which it was organized, and all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This nation has, for the accomplishment of the objects of its existence, all the attributes of sovereignty. The Constitution — providing that itself shall be the supreme law of the land, and binding upon all the judges of the several States, anything in the constitution or laws of any State to the contrary notwithstanding; requiring all the legislators, and executive and judicial officers of the United States, and of the several States, to take an oath or affirmation to support it; and defining what

shall constitute treason against the United States—shows that, so far as the objects and purposes of the national government extend, an allegiance is due to that government from all the citizens within its limits, paramount to and exclusive of any allegiance due to the several States; because the allegiance to the State arises under the State organization and constitution, which, to the extent covered by the Constitution of the United States, are subordinate to the authority of the United States, under that Constitution. There can be, therefore, no right on the part of any State, or of the people of any State, through or by any State authority or action, or by any popular vote, to terminate this allegiance to the United States.

The Union under the Constitution being perpetual and indissoluble, it is to be subverted only by the exercise of the right of revolution, for sufficient cause. And this right of revolution is a personal, and not a State right, and of an imperfect character; for an attempt at revolution is legally, in its inception, and until it is attended with success, neither more nor less than rebellion against the existing government, which of course has at least an equal right to resist the attempt by all the forces at its command. It follows, therefore, that those persons who have been active in the attempted secession of the several States have, as respects the United States, no authority derived from any State organization; nor any exemption, through the color of any exercise of State authority, from the ordinary consequences which attach to an insurrection or rebellion. No convention of the people of a State could confer any authority to resist the government of the United States, in the full exercise of its functions, in all of its departments, legislative, executive, and judicial; and still less could any act of a State legislature give any color of legal authority for such resistance, whether such legislature assumed to act under the State constitution as it existed before the attempted secession, or under the authority of a convention which, having declared the secession, assumed to confer new legislative

powers, or to adopt a new constitution. All persons who have placed themselves in hostility to the United States by acts of war, are of course responsible personally for those acts, as rebels and traitors. The State which they assume to represent is not responsible, because the State, as a State, did not, and could not, in any mode, give authority to commit acts of rebellion and treason. There is no war between any State, admitted into the Union, and the United States; because the State itself — the legal, constitutionally organized State — is not in rebellion; and there is therefore no authority to confiscate the property of any State, as State property, for any such State offence. The persons who have seized upon the State organization for the purposes of rebellion, and who wield an apparent State authority for such purposes, — who have, moreover, created a confederation under this usurpation, and style themselves governors and senators, generals and captains, president and secretaries, — are in no manner shielded by their titles or offices from the punishment due to their acts of treason, which are, in fact, in more senses than one, committed on private account.

This serves to show that the proclamation of President Lincoln, treating the seizure of forts, arsenals, and dock-yards, and the bombardment of Fort Sumter, as acts of insurrection, and requiring those concerned in them to retire peaceably to their respective abodes, was not only in precise accordance with the requisition of the statute of 1795, but was founded upon the only correct legal view of the existing state of things which called it forth. The acts of hostility against the government had, perhaps, assumed such formidable proportions as to be appropriately designated as war; but it was a war of persons owing allegiance to the general or national government, and not a war of governments. Those acts were not more than acts of treason because millions were engaged in them, and they were not less than acts of treason because of the assumed titles, military and civil, or of the assumption of

State or Confederate authority, under color of which they were committed. There were millions of people in India engaged in a war against the government of Great Britain, within a short period; and most of them acted under the orders of persons who stood to them in the relation of kings and princes, for certain purposes, having recognized authority for such purposes, but who had no authority for the objects and purposes of such a war; and they were all, kings, princes, and sepoys, held alike as rebels against the paramount government, — their guilt differing only in degree, according to the circumstances of enormity attending it. We do not inquire into the causes of that revolt, when we consider the case in its political and legal aspects in regard to the United States. That is a matter between the persons engaged in it and Great Britain. The government of the United States has nothing to dread from such an inquiry, in the present instance; but other nations will not enter into that inquiry, and it is foreign to our immediate purpose.

We perceive, therefore, that the criticism upon the proclamation of the President requiring the rebels to disperse, that it addressed its command in fact to millions, and that it was preposterous to require such large numbers, like an ordinary mob, to retire to their places of abode; and that other criticism which assumed that the States were the actors in the warfare which was waged, and that the statute and the proclamation could not apply, because the States had no abodes to retire to, — fail entirely of their intended force. Rebels may form political associations for themselves, and may assume to have a government for which they ask and claim recognition. They may, as between themselves, wield the powers of a State government, if they can usurp the State authority, and use it as if they were the rightful possessors of it. They may thus have a government *de facto*, and it may be, as among themselves, *de jure* also. But all this does not change their legal relations to the government against which they are in arms, until they

have by their power accomplished the purpose of the insurrection, by a practical maintenance of their assumed independence.

We deduce from these premises the conclusion, that, as regards the United States, there is no right in any organization which these rebels and traitors have constituted — whether designated as State or Confederation — to enact a law, or to adopt an ordinance, which shall be recognized by the United States as having force or effect as a legal enactment, or as conferring upon any person power to be used in hostility to the existing government. There can be no lawful confederation of the States involved in the attempted secession, because there has been no secession of those States which is recognized as having any validity. They still remain as component parts of the United States, having doubtless a large loyal population, although the violence of the insurgents has for a time suspended the due exercise of the authority of the United States, and that of the State also, by a usurpation of the powers of the latter, and an exercise of the semblance of authority under the State organization. As States in the Union, the Constitution expressly forbids any confederation among them; and for that reason also, if there had been no insurrection, and no attempt to array State authority against the national government, the confederation of the States would be unconstitutional; the self-styled Congress of the Confederate States an unauthorized body; and the so-called President of that confederation, and his cabinet councillors, suitable subjects for the criminal jurisprudence of the United States, on an indictment for a conspiracy, — if their acts of war had not made them liable to the graver penalty attached to treason.

As a necessary consequence of all this, the proclamation of Mr. Jefferson Davis, calling himself President of the Confederate States, in which he invited applications for letters of marque and reprisal against the United States, — or, in other words, in a legal view, Mr. Davis's advertisement for pro-

posals to rob, under his sanction, such citizens of the United States as might have property afloat, — was no better than the advertisement of any other private person; and the letters of marque and reprisal issued by him as President, and countersigned by R. Toombs as if he were a Secretary of State, are, as respects the United States, no better than so much waste paper, for the justification and protection of those who capture property under them. Such persons are amenable to the laws of the United States as pirates, under the act of Congress of 1790, Chapter 9.

The eighth section of that statute provides that, "if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular State, murder or robbery, or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death; . . . . . every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and, being thereof convicted, shall suffer death." The ninth section enacts that, "if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death."

The insurgents are not absolved from responsibility under this statute by the fact that their offences were committed in the course of what in other aspects may have the character of war, nor by the fact that they have been taken prisoners in that war.

Martens admits the right of the conqueror to take the lives of prisoners in three cases: —

"1. When sparing their lives is inconsistent with his own safety;

2. in cases where he has the right to exercise the *talio* or to make reprisals; 3. when the crime committed by those who fall into his hands justifies the taking of their lives." — *Summary of the Law of Nations*, Chap. 3, Sect. 4.

Vattel concedes a right to punish prisoners who have been personally guilty of some crime against the captor.

"Prisoners may be secured, and, for this purpose, they may be put into confinement, and even fettered if there be reason to apprehend that they will rise upon their captors or make their escape. But they are not to be treated harshly, unless personally guilty of some crime against him who has them in his power. In this case he is at liberty to punish them; otherwise he should remember that they are men, and unfortunate." — Book III. Chap. 8, Sect. 150.

It is by no means clear that those who come under the condemnation of this statute of 1790 by acts of force and plunder on board the Confederate privateers, would not be liable to the same condemnation under the rules of public law; for although a pirate is generally described as *hostis humani generis*, because the buccaneer ordinarily makes war indiscriminately upon the vessels of all nations, yet if a band of sea-robbers should confine their depredations to the commerce of a single nation, it would seem that, as to that nation, their crime might well be regarded as piracy, even if other nations whose commerce was not assailed did not so regard it.

It may be asked wherein consists the material difference between persons who act under a privateer's commission, and capture property on the high seas, and those who wage war upon the land, and commit homicide, and burn, destroy, or capture property there. Why should the former when taken be held and treated as pirates, and the others when captured held and exchanged as prisoners of war? It is a sufficient answer to this to say, that the war of the privateer is mainly upon the property of private persons, by private parties, for their private emolument. If the privateer attack a public

vessel, it is the exception, and not the rule; she is not commissioned with that view. On the other hand, the war of the land forces is of a more public character, such as fighting battles offensive or defensive, assaults upon forts and batteries, and the like, and their interference with private property is usually incidental to those more direct and public operations. The object of the hostilities waged by privateers is mainly gain, by the plunder of commercial vessels; the injury done to the enemy being only incidental to that object. The object of the military operations upon land is ordinarily the public object of the war, whatever that may be, the injury done to private property being incidental to the measures taken for that purpose. If, then, the hostilities of the privateer are not regarded as war under lawful authority, they have the character of private acts, to wit, murder and robbery.

Letters of marque and reprisal were originally granted to merchants who had lost goods by capture, in order that they might indemnify themselves by capture of the property of subjects of the offending nation. They were, and may still be, used before a war, as a means of procuring justice for a wrong or injury sustained by a nation, its citizens or subjects; but a resort to this measure presupposes the existence of such wrong or injury.

"When a nation cannot obtain justice, whether for a wrong or an injury, she has a right to do herself justice. But before she declare war (of which we shall treat in the following Book), there are various methods practised among nations, which remain to be treated of here. Among those methods of obtaining satisfaction has been reckoned what is called the law of retaliation, according to which we make another suffer precisely as much evil as he has done. . . . . .

"Let us say, then, that a nation may punish another which has done her an injury, as we have shown above (see Chap. IV. and VI. of this Book), if the latter refuses to give a just satisfaction; but she has not a right to extend the penalty beyond what her own safety requires. Retaliation, which is unjust between private persons, would be much

more so between nations, because it would, in the latter case, be difficult to make the punishment fall on those who had done the injury. What right have you to cut off the nose and ears of the ambassador of a barbarian who had treated your ambassador in that manner? As to those reprisals in time of war which partake of the nature of retaliation, they are justified on other principles; and we shall speak of them in their proper place." — *Vattel*, Book II. Chap. XVIII. Sect. 339.

"Reprisals are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, — if she refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, — the latter may seize something belonging to the former, and apply it to her own advantage till she obtains payment of what is due to her, together with interest and damages, — or keep it as a pledge till she has received ample satisfaction." — *Ibid.*, Sect. 342.

"There are cases, however, in which reprisals would be justly condemnable, even when a declaration of war would not be so; and these are precisely those cases in which nations may with justice take up arms. When the question which constitutes the ground of a dispute relates, not to an act of violence, or an injury received, but to a contested right, — after an ineffectual endeavor to obtain justice by conciliatory and pacific measures, it is a declaration of war that ought to follow, and not pretended reprisals, which, in such a case, would only be real acts of hostility, without a declaration of war, and would be contrary to public faith, as well as to the mutual duties of nations." — *Ibid.*, Sect. 354.

"Reprisals by commission, or letters of marque and reprisal, granted to one or more injured subjects, in the name and by the authority of a sovereign, is another mode of redress for some specific injury, which is considered to be compatible with a state of peace, and permitted by the law of nations. The case arises when one nation has committed some direct and palpable injury to another, as by withholding a just debt, or by violence to person or property, and has refused to give any satisfaction." — 1 *Kent's Comm.* 61.

The principle stated in these authorities relates to reprisals as a measure of redress before the existence of a war. But

when reprisals are resorted to in time of war, for the purpose of weakening the enemy by depriving his subjects or citizens of their property, the principle that there can be no lawful reprisals until an injury is sustained is equally applicable.

Wheaton enumerates, "among the various modes of terminating the differences between nations by forcible means short of actual war," —

4. "By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury."

He says: —

"Reprisals are also *general* or *special*. They are *general* when a state which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war, and may be considered as amounting to a declaration of hostilities, unless satisfaction is made by the offending state. *Special* reprisals are where letters of marque are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation."

"Reprisals are to be granted only in case of a clear and open denial of justice." — *Elements of Int. Law*, Part IV. Chap. I. Sect. 1, 2.

It is one of the singular features, however, of this controversy and warfare, and one of the strange perversions of all ordinary action, that the proposals by Mr. Jefferson Davis to issue "letters of marque and *reprisal*" were made before any article of property belonging to the Confederate States, or any one of them, or to any person claiming to be a citizen of any one of those States, had been interfered with; or any person belonging to the Confederate States had been molested by the government of the United States, except in self-defence.* It is true that the United States in the war of 1812, by the same

* April 17, 1861.

act in which they declared the existence of the war, authorized the President to issue letters of marque and reprisal; but it must be recollected that they complained of long-continued grievances by reason of the seizure of men and property, the confiscation of property, and the denial of reparation. The cases are not only unlike; they are entirely dissimilar. The Confederate States can hardly claim to make reprisals because of the passage of a tariff long since repealed, even supposing it to have been onerous; or the passage of personal-liberty laws by some of the States; or the refusal of Congress to assent that slavery should be admitted into the Territories; or the election of Mr. Lincoln. None of these things were done to, or suffered by, the Confederate States, which were not then in existence as a belligerent power, or in separation from the United States. In the war of the Revolution, the United Colonies did not attempt to authorize the capture of private property until nearly a year after the commencement of hostilities. Not so the Secessionists. There is no doubt that, from the first, even before any vote of secession, this warfare upon private property was relied upon as one of the means of insuring the success of the insurrection. "If you do not let us secede without any attempt at coercion, we will refuse to pay our debts, and, by means of privateers, ruin your commerce."

From what has been thus stated, we draw a further conclusion that the recent order of Mr. Judah P. Benjamin, acting Secretary of War for the Confederate States, subjecting Colonels Corcoran, Wood, and Lee, Major Revere, and others, who were taken prisoners by the Confederate forces at the battle of Ball's Bluff, to imprisonment in the dungeons of felons, in retaliation or reprisal for the imprisonment of persons taken prisoners on board of the Confederate privateers, some of whom have been tried for piracy under the statute of the United States before cited, is a gross violation of the rules of honorable warfare. The Confederates attempt to escape from the odium of treason by alleging the existence of war. They are bound,

then, to conduct the warfare on their part according to the usages of civilized nations. But there is no usage of nations by which one belligerent, having prisoners who have never been amenable to its laws, and have committed no crime against them, but who have been taken in battle fighting under their own banners, can immure those persons in damp dungeons, and subject them to the treatment of convicts, merely because its belligerent adversary, finding among his prisoners those who according to his laws owe allegiance, and have committed treason, or who in violation of long-existing statutes have incurred the guilt of piracy, proceeds with such persons in the ordinary course of justice according to those laws. If one belligerent merely proceeds according to law, that furnishes no reason why the other should resort to measures sanctioned by no law. The law of reprisals, as it affects persons, — usually termed retaliation, or *lex talionis*, — may rightfully be resorted to in time of war by one nation, when a gross outrage in violation of the laws of war has been committed upon its citizens or subjects by the other, in order to restrain and prevent further outrage. Some of the accredited writers upon public and natural law will, however, hardly sustain even this proposition.

Rutherforth expressly denies the right of retaliation by killing prisoners, when the enemy has done the same thing : —

" The exceptions to this rule of not killing these persons, who never were in arms at all, or who, though they have been in arms, have surrendered themselves, are very few. If they are considered as members of the nation with which we are at war, nothing more is necessary, in the first instance, than to get them into our power. The law of nature, therefore, will not allow us to go further. But if they whom we thus get into our power have been guilty of any previous crime for which they deserve death, this law does not forbid us to inflict this punishment, any more than if they and we were members of no society at all, but were still in the original state of nature.

" The obstinacy of holding out long in a siege, is not one of these

crimes; for a discharge of their duty towards their own nation is not in its own nature a crime against the other. There might, perhaps, be some advantage in putting a garrison to the sword for holding out long, as such an example might be a means to deter others from giving the besiegers the same trouble; but neither this nor any other motive of mere utility will render it just to take away the lives of those who are in our power, and have not deserved to lose them. Neither is retaliation a justifiable cause for killing prisoners of war. Though our adversaries should have killed the prisoners whom they have taken from us, this will not justify us in killing the prisoners whom we have taken from them. The law of nature allows of retaliation only where they who have done harm are made to suffer as much harm as they have done. But to kill such prisoners of war as are in our power, because the nation to which they belong has treated our countrymen in this manner, would be to do harm to one person because harm had been done by another. An injury which is done by a nation does, indeed, communicate itself to all the members of that nation; and such a communication of guilt is all that can be pleaded for the retaliation of which we have been speaking. But Grotius very truly replies here, that to punish captives or prisoners of war in this manner would be to punish them in what is their own as individuals, whereas the national guilt can only be communicated to them as they are members of the offending nation; and consequently the proper punishment of it should only be inflicted on them as they are members of the offending nation, and not as they are individuals." — *Institutes of Natural Law*, Book II. Chap. 9, Sect. 15.

"Prisoners of war are, indeed, sometimes killed; but this is no otherwise justifiable than as it is made necessary, either by themselves, if they make use of force against those who have taken them, or by others, who make use of force in their behalf, and render it impossible to keep them. And as we may collect from the reason of the thing, so it likewise appears, from common opinion, that nothing but the strongest necessity will justify such an act; for the civilized and thinking part of mankind will hardly be persuaded not to condemn it till they see the absolute necessity of it." — *Ibid.*

Martens admits a more extended rule. Under the head of Reprisals, he says: —

"A sovereign violates his perfect obligations in violating the natural or perfect rights of another. It matters not whether these rights are innate, or whether they have been acquired by express or tacit covenant, or otherwise.

"In case of such violation, the injured sovereign may refuse to fulfil his perfect obligations towards the sovereign by whom he is injured, or towards the subjects of such sovereign. He may also have recourse to more violent means, till he has obliged the offending party to yield him satisfaction, or till he has taken such satisfaction himself, and guarded himself against the like injuries in future.

"There are many acts by which a sovereign refuses to do or to suffer what he is perfectly obliged to do or to suffer, or by which he does what he is ordinarily obliged to omit, in order to obtain satisfaction for a real injury sustained. All these acts are called reprisals. Consequently, reprisals are of many sorts. The *talio*, by which an injury received is returned by an injury exactly equal to it, is one sort of reprisals; but the use of it is not indiscriminately permitted on all occasions." — *Law of Nations*, Book VIII. Chap. 1, Sect. 3.

In a note he adds: —

"If the ambassador or messenger of a state has been put to death by another state, the former state could not, on that account, have a right to put the ambassador or messenger of the latter to death; but in time of war, a prisoner of war may sometimes be put to death in order to punish a nation that has violated the laws of war. In the first case, the injured nation has other means of obtaining satisfaction, and of guarding against such violations for the future; but war being of itself the last state of violence, there often remains no other means of guarding against future violations on the part of the enemy."

So Vattel admits the right to execute prisoners in retaliation for an execution by the hostile general without any just reason, and against an inhuman enemy who frequently commits enormities.

"This leads us to speak of a kind of retaliation sometimes practised in war, under the name of reprisals. If the hostile general has, without any just reason, caused some prisoners to be hanged, we hang an equal number of his people, and of the same rank, — notifying to him

that we will continue thus to retaliate, for the purpose of obliging him to observe the laws of war. It is a dreadful extremity thus to condemn a prisoner to atone, by a miserable death, for his general's crime; and if we had previously promised to spare the life of that prisoner, we cannot, without injustice, make him the subject of our reprisals. Nevertheless, as a prince or his general has a right to sacrifice his enemies' lives to his own safety and that of his men, it appears, that, if he has to do with an inhuman enemy, who frequently commits such enormities, he is authorized to refuse quarter to some of the prisoners he takes, and to treat them as his people have been treated." — Book III. Chap. 8, Sect. 142.

Chancellor Kent sums up the authorities in these words: —

"Cruelty to prisoners, and barbarous destruction of private property, will provoke the enemy to severe retaliation upon the innocent. Retaliation is said by Rutherforth not to be a justifiable cause for putting innocent prisoners or hostages to death; for no individual is chargeable, by the laws of nations, with the guilt of a personal crime, merely because the community of which he is a member is guilty. He is only responsible as a member of the state, in his property, for reparation in damages for the acts of others; and it is on this principle that, by the law of nations, private property may be taken and appropriated in war. Retaliation, to be just, ought to be confined to the guilty individuals, who may have committed some enormous violation of public law. On this subject of retaliation, Professor Martens is not so strict. While he admits that the life of an innocent man cannot be taken, unless in extraordinary cases, he declares that cases will sometimes occur, when the established usages of war are violated, and there are no other means, except the influence of retaliation, of restraining the enemy from further excesses. Vattel speaks of retaliation as a sad extremity, and it is frequently threatened without being put in execution, and probably without the intention to do it, and in hopes that fear will operate to restrain the enemy. Instances of resolutions to retaliate on innocent prisoners of war occurred in this country during the Revolutionary war, as well as during the war of 1812; but there was no instance in which retaliation beyond the measure of severe confinement took place in respect to prisoners of war." — *Commentaries*, I. 93, 94.

From the more recent work of Wheaton, we quote to the same effect.

"A belligerent has, therefore, no right to take away the lives of those subjects of the enemy whom he can subdue by any other means. Those who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy's country, who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war. Those ends may be accomplished by making prisoners of those who are taken in arms, or compelling them to give security that they will not bear arms against the victor for a limited period, or during the continuance of the war. The killing of prisoners can only be justifiable in those extreme cases where resistance on their part, or on the part of others who come to their rescue, renders it impossible to keep them. Both reason and general opinion concur in showing, that nothing but the strongest necessity will justify such an act." — *International Law*, Part IV. Chap. 2, Sect. 2.

"The exceptions to these general mitigations of the extreme rights of war, considered as a contest of force, all grow out of the same original principle of natural law, which authorizes us to use against an enemy such a degree of violence, and such only, as may be necessary to secure the objects of hostilities. The same general rule, which determines how far it is lawful to destroy the persons of enemies, will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary, in order to accomplish the just ends of war, it may be lawfully done, but not otherwise. Thus, if the progress of an enemy cannot be stopped, nor our own frontier secured, or if the approaches to a town, intended to be attacked, cannot be made without laying waste the intermediate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war. If modern usage has sanctioned any other exceptions, they will be found in the right of reprisals or vindictive retaliation. The whole international code is founded upon reciprocity. The rules it prescribes are observed by one nation, in confidence that they will be so by others. Where, then, the established usages of war are violated by an enemy, and there are no other means of restraining his excesses, retaliation may justly be resorted to by the suffering nation, in order to compel the

enemy to return to the observance of the law which he has violated." — *Ibid.*, Sect. 6.

It is not astonishing, however, that those who violate all principle by the issue of letters of marque and reprisal when no injury has been done to them, and offer a premium of twenty dollars each for the destruction of persons on board any armed vessel of the United States sunk, burnt, or destroyed by a privateer of equal or inferior force, should imprison and threaten to hang other innocent persons, without any trial, merely because their adversary subjects those who accept and act under such commissions to plunder private property, and kill persons on the high seas, to an ordinary trial by jury for alleged offences committed against the laws of the government whose citizens are thus assailed.

But although the insurgents stand legally, as to the United States, in the position of rebels and traitors, and their privateersmen as pirates, and may be so held and treated, it is not a necessary result that the penalty should be exacted, nor that the warfare which exists should be carried on, in all respects, upon the assumption that the only *status* which can be assigned to them is that of rebels. An insurrection may, as we have seen, result in what is properly denominated a war, without losing its character as an insurrection, and without any exemption of those who participate in it from the penalties legally attached to rebellion. Such is the case with all civil wars which originate in an attempt to overthrow the existing government, or seek a separation from it. But in proportion to the magnitude and gravity of the warfare, it gradually loses, in the public mind, its distinctive character as an insurrection, being known as a civil war; and then it is hardly expedient to insist upon the enforcement of the extreme penalties of treason and piracy, against those who are merely subordinate and hireling agencies in wickedness. If such penalties are enforced at all, it should be against the active instigators of, and principals in, the rebellion; but these are the very offenders most likely to escape.

Great Britain, although she imprisoned several of the Colonists in the course of the war for Independence, and treated them thus far as rebels, did not in any case proceed to the extreme measure of execution.

When a rebellion is not immediately suppressed, but assumes the proportions and character of a war on the side of the insurgents, the parties to that war have necessarily, to a certain extent, the political character of belligerents. The government assailed must employ military forces, and place them in conflict with the military force arrayed against it; and the ordinary result of such conflict is the capture of prisoners on both sides. In the first stage of such a conflict, it may be just that the government assailed should treat its prisoners according to their legal *status* as traitors, or pirates, as one of the means of suppressing the insurrection. But when it is apparent that this means fails of its purpose, and becomes an unnecessary severity, the question immediately arises whether the government is not unjust to the persons whom it holds as captives, and who were mere subordinates in the hostilities which have been waged, if it refuse to extend to them the usual treatment of prisoners of war. And the more significant question follows, to wit, whether it is not guilty of still more gross injustice if it leave its own soldiers, who by misfortune have fallen into the hands of the other party, to the hardships of a captivity which it could terminate at any time by an exchange. That government which sends its soldiers into the field with the understanding that, if taken prisoners, they will be left to their fate, without an attempt to redeem them from the hardships and sufferings incident to such captivity, except by the ultimate success of the war, may thereby give them an additional incentive to fight unto death in any hopeless encounter in which they shall happen to be involved; but when it places itself on such a platform, it shows that it has little care for the comfort or safety of those who fight its battles. Certainly, an administration which should long conduct a war

on that principle would not deserve to have battles fought for it.

An exchange of prisoners, while it is thus far a recognition, by implication, of a political *status* of the insurgents as an organized force, implies nothing respecting the legal character of that force. An exchange of prisoners may be made with an independent belligerent nation long established; it may be made with a belligerent barbarian; and so it may be made with insurgents, or even with those who are strictly pirates.

It seems clear that, while, on the one hand, the insurgents, by any amount of force which they can muster in the field, in giving to the contest the character of a war, cannot deprive the government assailed of the right to treat them as traitors; so, on the other hand, government may voluntarily recognize the force arrayed against it as that of a belligerent party, against which it may adopt the modes of warfare usual among nations, as, for instance, a blockade, — or with which it may negotiate for the mitigation of the horrors and sufferings of the warfare, as by an exchange of prisoners, — without thereby depriving itself of the right still to hold the persons engaged in the insurrection as traitors or pirates, according to the nature and character of their hostile acts.

Regarding the Secessionists as mere insurgents and traitors, who by means of the insurrection have for the time subverted the legitimate authority of the United States, and deprived that government of the revenue from customs within the limits of the insurrection, — attempting at the same time to appropriate such revenue to their own use, — the government might, by a mere act or order, have closed the ports, as one of the means of suppressing the insurrection, instead of battering down the towns, which would, perhaps, be somewhat more effectual. There seems to be no reasonable doubt that the President — who, under his power and duty to suppress the insurrection, might order the latter to be done, if in his judg-

ment the exigency required it — might resort to the milder measure of interdicting all commerce there, when it became apparent that such commerce was not, and could not be, carried on with the United States, and, instead of being beneficial, was hostile to them. No blockading force is necessary to the validity of such an act or order. Each nation has a right, for its own reasons, to constitute and to abolish ports of entry; and one of the reasons for abolishing a port might be the existence of an insurrection there. And so long as other nations recognize the jurisdiction and authority of the government which abolishes, over the *locus in quo*, they must respect the act or order which denies entrance there, although it may be a mere paper regulation, without any military or naval force to support it. If, however, the abolishment of the port was in fact an act of hostility for the purpose of inflicting an injury upon another nation, instead of being designed as a municipal or domestic regulation, it might give just cause of offence.

But an act discontinuing a port of entry, or an order closing such a port and interdicting commerce there, is a very different matter from a blockade of the port. The term "blockade" has its appropriate signification. It means to block up, or shut up, — not to subvert or abolish; nor does it signify the closing of the port, except by the presence of a force for that purpose. A blockade, properly so called, while it may be used to suppress an insurrection, is not a mere measure for that purpose, without other incidents or consequences attached to it. A blockade proper imports the closing of the port of an enemy by a hostile power, thereby forbidding entrance and exit, under certain rules and limitations, and with certain exceptions; and it implies at the same time a right in other nations to enter and clear from the port, under the party in actual possession of it, if the blockade is not made effectual by a competent force. It is not the exercise of a mere municipal or domestic right, like that of closing a port by a repealing act, or an affirmative order for the purpose; but it is a

right of war, acknowledged by the law of nations as existing in favor of one belligerent against the other, and regulated by the rules of international law.

A few extracts from an approved elementary work will be sufficient to show the nature of a blockade.

"Among the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary in the application, than that which gives rise to the law of blockade. Bynkershoek says, it is founded on the principles of natural reason, as well as on the usage of nations; and Grotius considers the carrying of supplies to a besieged town, or a blockaded port, as an offence exceedingly aggravated and injurious. They both agree that a neutral may be dealt with severely; and Vattel says, he may be treated as an enemy. The law of blockade is, however, so harsh and severe in its operation, that, in order to apply it, the fact of the actual blockade must be established by clear and unequivocal evidence; and the neutral must have had due previous notice of its existence; and the squadron allotted for the purposes of its execution must be competent to cut off all communication with the interdicted place or port; and the neutral must have been guilty of some act of violation, either by going in, or attempting to enter, or by coming out with a cargo laden after the commencement of the blockade. The failure of either of the points requisite to establish the existence of a legal blockade, amounts to an entire defeasance of the measure, even though the notification of the blockade had issued from the authority of the government itself.

"A blockade must be existing in point of fact; and in order to constitute that existence, there must be a power present to enforce it."

"The definition of a blockade given by the convention of the Baltic powers, in 1780, and again in 1801, and by the ordinance of Congress, in 1781, required that there should be actually a number of vessels stationed near enough to the port to make the entry apparently dangerous."

"The occasional absence of the blockading squadron, produced by accident, as in the case of a storm, and when the station is resumed with due diligence, does not suspend the blockade, provided the suspension, and the reason of it, be known; and the law considers an attempt

to take an advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud. . . . . But if the blockade be raised by the enemy, or by applying the naval force, or a part of it, though only for a time, to other objects, or by the mere remissness of the cruisers, the commerce of neutrals to the place ought to be free. The presence of a sufficient force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade."

"The object of a blockade is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port. The act of egress is as culpable as the act of ingress, if it be done fraudulently. . . . . The modern practice does not require that the place should be invested by land as well as by sea, in order to constitute a legal blockade; and if a place be blockaded by sea only, it is no violation of belligerent rights for the neutral to carry on commerce with it by inland communications.

"It is absolutely necessary that the neutral should have had due notice of the blockade, in order to affect him with the penal consequences of a violation of it. . . . . After the blockade is once established, and due notice received, either actually or constructively, the neutral is not permitted to go to the very station of the blockading force, under pretence of inquiring whether the blockade had terminated, because this would lead to fraudulent attempts to evade it, and would amount in practice to a universal license to attempt to enter, and, on being prevented, to claim the liberty of going elsewhere."

"A neutral cannot be permitted to place himself in the vicinity of a blockaded port, if his situation be so near that he may, with impunity, break the blockade whenever he pleases, and slip in without obstruction. If that were to be permitted, it would be impossible that any blockade could be maintained."

"The fact of clearing out or sailing for a blockaded port is, in itself, innocent, unless it be accompanied with knowledge of the blockade."

"In *Yeaton* vs. *Fry*, the Supreme Court of the United States coincided essentially with the doctrine of the English prize courts; for they held that sailing from Tobago for Curaçoa, knowing the latter to be blockaded, was a breach of the blockade, and, according to the opinion

of Mr. Justice Story, in the case of the *Nereide*, 'the act of sailing with intent to break a blockade is a sufficient breach to authorize confiscation.' . . . . . If the ports be not very wide apart, the act of sailing for the blockaded port may reasonably be deemed evidence of a breach of it, and an overt act of fraud upon the belligerent rights."

"The consequence of a breach of blockade is the confiscation of the ship; and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship. . . . . If a ship has contracted guilt by a breach of blockade, the offence is not discharged until the end of the voyage. The penalty never travels on with the vessel farther than to the end of the return voyage; and if she is taken in any part of that voyage, she is taken *in delicto*." — 1 *Kent's Com.*, 143 – 151.

It appears from all this, that a blockade admits, by implication, that the port is in the possession of a party or power with which the blockading party is at war, and with which neutral nations, if they please, may hold commercial intercourse, subject to the laws of war, without payment of duties to the party instituting the blockade, or interruption by that party except by the blockade, or other warlike operations. In other words, the port is governed for the time being, as between the blockading party and neutral nations, by the law of nations applicable to war between two powers, — instead of being governed, as to them as well as its possessors, by the domestic law applicable to the insurrectionary resistance to the established government. That government cannot say to neutrals, "We debar you from entering this port because it is blockaded, and if you violate the blockade, you will be liable to capture and condemnation," — leaving them to inquire whether the blockade is maintained, and to govern themselves by the law applicable to it, — and at the same time say, "All intercourse with the place is forbidden, because it is our port, but, by reason of insurrectionary force, commerce there cannot be carried on with the United States, and the place, therefore, is no longer to be treated as a port during the continuance of the insurrection."

The right to treat the insurrectionary force as a belligerent power by the institution of a blockade, thus leaving neutral nations at liberty, if they please, to hold commercial intercourse with the insurgents as a belligerent power, so far as they may without a violation of the blockade, is entirely consistent with the position that the insurgents themselves are mere rebels and traitors. In fact, any foreign nation may oblige the government assailed to resort to a blockade in order to prevent commercial intercourse with the insurgents, so far as such nation is concerned, by an acknowledgment of their independence, or, according to modern usage, by a recognition of them as a belligerent power, with a proclamation of neutrality between the contending parties, — which certainly can in no way affect the right of the existing government to deal with the insurgents as traitors, under its own municipal law. And if the government pleases to institute a blockade in anticipation of such compulsion, no implication can arise from it changing the legal relations of the parties.

Another good reason exists why the government assailed may prefer to give to the insurgent force this character of a belligerent party, so far as its relations with foreign nations are concerned. The laws of blockade, and of capture for violation of it, and the proceedings for adjudication thereupon, are, in general, well settled and defined; while the rules which must regulate punishment for any violation of an order closing the port, and forbidding entrance into it, as a means of suppressing the insurrection, without a blockade, are not so well settled; and attempts to deal with infractions of such order by vessels of foreign powers would lead to unnecessary collisions, certainly after a recognition of belligerency.

It has been contended that a nation cannot blockade its own ports; but this position is not tenable when the port is in possession of a hostile force. To deny the right of blockade in such case would be to deny its right to the port, or, practically, to make it a free port until the government which for-

merly held and still claimed it should destroy it; for no mere order or act for closing it could be of any avail against a foreign nation which pleased to recognize the insurgents as belligerents, without a blockade superadded.

This leads us to a more extended examination of the relations which foreign nations do or may, according to the rules of international law, sustain to those who, under the plea of Secession, are using the names and styles of several States, and who, with the assumption of State and Confederate authority, are waging insurrectionary warfare against the United States. It is apparent, from what has been said, that these relations might be either one of three different descriptions.

1. In the case of an insurrection, accompanied by an attempt to establish an independent government, a foreign nation may decline in any wise to interfere in the contest, treating the case precisely as if it were an insurrection which in no way affected its interests, except as the actual force of the insurgents interrupts the exercise of authority by the government assailed in places where that government had before exercised it, and still claims the right to continue its exercise. This is substantially the position of Russia, and, in fact, of all European and other foreign powers, as respects the United States, — Great Britain, France, and Spain excepted.

The foreign government which places itself in this relation may, and in some contingencies must, recognize the existence of the insurrection, and vary its action, or that of its citizens and subjects, accordingly. As, for instance, if the United States government should prohibit the entrance of any vessel into a particular port or ports, because the people of the place were in a state of insurrection, so that commerce with the United States under existing treaties could not be carried on there, a government declining any recognition of the insurgents, or interference with reference to the contest, would instruct its subjects, consuls, and officers to regard the prohibition, and comply with the regulation of the existing government, as if that

government still possessed full jurisdiction and control over its bays, harbors, and waters, as before the existence of the insurrection, — without requiring any actual blockade of the ports in order to enforce the prohibition. It may be quite consistent with such a position for the foreign government to claim that all vessels belonging to its subjects, which should enter the ports without notice of the prohibition, should be permitted to dispose of their cargoes and depart with such clearance as could be obtained there, in the same manner as if the prohibition had not existed; because, acting in good faith toward the government, as if the insurrection did not exist, and leaving that government to contend with it without any interference or recognition of the authority or political existence of the insurgents, the foreign nation might well claim that its subjects should not suffer loss, or be prejudiced, without warning.

A foreign nation occupying such a position comes under no obligation, and owes no duty, to the insurgent power. It may carry on its commerce with the government assailed without any liability, under the law of nations, to search and seizure for contraband goods. It may avail itself of any implied recognition of the insurgents by the government assailed, as by the institution of a blockade, and insist that its subjects have a right to hold commercial intercourse with the insurrectionary power as a belligerent, so far as they may consistently with the blockade. It will naturally refuse to permit its vessels to be overhauled and detained by vessels commissioned by the insurgents as privateers, and may well treat such interference as piratical; although it will be at its pleasure, and consistent with its position, to permit such visitation as may serve to ascertain the nationality of its vessels, without any search for enemies' property, or articles contraband of war.

Such a position would by no means require the foreign nation, which ignored the insurgent force as an existing power, to treat the privateers commissioned by the insurrectionary government as pirates. It is true, that the British govern-

ment, in the case of Greece, in 1825, alleged that "a power or a community which was at war with another, and which covered the sea with its cruisers, must either be acknowledged as a belligerent, or dealt with as a pirate." But the necessity is certainly not apparent, in respect to any nation whose vessels are not interfered with by such cruisers. With the exception of nations whose commerce is assailed, it is not necessarily an objection to a privateer that she holds a commission from an unrecognized power. Piracy, it is evident, may be of a general, or of a limited character. The slave-trade is piracy under the laws of Great Britain and of the United States. But this does not constitute it piracy as to other nations. And the same may be true of that description of piracy which consists in robbing merchant-vessels on the high seas. The fact, that those who act as privateers under commissions from the Confederate States are pirates by the express provision of the act of Congress before cited, as regards the United States, against whose vessels they direct their warfare, does not constitute them pirates as respects other nations. And the result would be the same, if, by the rules of public law, also, the United States might hold them to be pirates. France, before her recognition of the independence of the United American Colonies, did not treat their privateers as pirates; and the government of the United States has in several instances acted on the principle that privateers of insurgents not acknowledged were not pirates as to the United States, and were not subject to capture as such.* But if a vessel commissioned as a privateer by an unrecognized belligerent rob a vessel of a neutral nation, may not any nation treat the act as piracy? †

2. Any foreign nation, whenever the circumstances are such as to warrant it, may acknowledge, for itself, the independence

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* 3 Wheaton's Reports, 610, United States *vs.* Palmer; 7 Wheaton's Rep. 283, The Santissima Trinidad; Case of Captain P. P. Voorhies, before a naval court-martial, in 1844.

† 1 Phillimore's Int. Law, 398 - 406.

of an insurgent organization, recognizing it as having a national existence, and treating it as a nation; in which case it may form an alliance with the insurgent government, offensive and defensive, and thus become a party to the war; or it may, with such acknowledgment, assume a position of neutrality, claiming the rights of a neutral, as between what would then, to the party recognizing the independence of the insurgents, be two equally independent belligerent nations. Such acknowledgment of the independence of an insurgent party, before its independence is recognized by the government which it assails, may or may not furnish just cause of war on the part of that government, according to the circumstances under which it is made. If the acknowledgment follows very soon upon the breaking out of the insurrection, and while the government is pursuing active and energetic measures to suppress it, the aid and encouragement thereby given to the rebels would furnish just cause of offence to the existing government. On the other hand, after the contest has been of long continuance, and the independence of the insurrectionary party has been practically maintained for such a period as to show its capacity to uphold it, then the interests of other nations may well justify them in an acknowledgment of what has been accomplished, — in a recognition of an existing fact, — without just cause of offence to the government which has been resisted, and which has failed to overcome that resistance. The commercial interests of nations having no interest in the contest may require that they should make the recognition, for the purpose of trade, or for other desirable ends; and the existing government cannot complain of the mere acknowledgment of an actual fact. But such recognition should follow only a practical independence. Such was the case with the acknowledgment of the independence of the South American republics by the United States in 1823, the latter assuming to act as a neutral nation.

The insurgent party, upon such acknowledgment, may

claim the right to send an ambassador or minister to the nation making it, and may expect in due course of time to receive one, and to have their intercourse regulated by treaty. After such an acknowledgment, if the nation making it does not become a party to the war, — either by a treaty of alliance with the party thus recognized, or by a declaration of war by the government assailed, on account of the recognition, — the nation making the acknowledgment is entitled to claim the rights of a neutral with respect to each of the belligerent parties, treating each as a nation, and forming treaties with the insurgent party, as if it were a nation, equally with its adversary; and it may send and receive ambassadors, and trade to and from any ports occupied and held by the party acknowledged, except so far as it is prevented by the exercise of rights accorded by international law to belligerents against neutrals.

The neutral nation has the right to require that its territory shall not be made the theatre of war, nor made use of for the purposes of war, and that hostile enterprises shall not originate in, or be carried on, from it. Its citizens and subjects may be the carriers of the goods of either belligerent, subject to the right of the other belligerent to capture such goods, and to search and detain the neutral vessel for that purpose, but not to confiscate the ship; and they may maintain free commercial intercourse with each belligerent, subject to the rules which forbid aid to the belligerent in the prosecution of the war, and to the right of the belligerent to prevent such intercourse by an efficient blockade.

The duty of the neutral is not to favor one belligerent to the detriment of the other, — not to transport munitions of war, or other goods contraband of war, to either belligerent, — not to carry officers, soldiers, or despatches of either, — to respect any blockade by one belligerent, of the ports of the other, if it is efficient, — and, generally, not to aid either belligerent, in the prosecution of the war, except as the ordinary commercial transactions in goods not contraband incidentally furnish such aid.

The rights of the belligerent as respects the neutral are, to visit and search his merchant-vessels, on the high seas, for the purpose of ascertaining whether enemies' property, or goods contraband of war, or persons whom the neutral may not carry, are on board; to capture the property of the enemy so found;* and for violation of belligerent rights, by aid rendered to the enemy in transporting goods contraband of war, or persons in the service of the enemy in the prosecution of the war, as officers, soldiers, or other functionaries, or the despatches of the enemy, — and also for violation of blockade, — to capture and confiscate the ship and goods.

These are the principal rights and duties of the parties, as set forth, in substance, by accredited writers on international law, subject in some instances to limitations and modifications, to which we shall refer, so far as they appear to be material to the present discussion.

No nation has as yet acknowledged the independence of the Confederate States. Such acknowledgment is not usually made, unless by a nation which is disposed to ally itself with the insurgents in hostility to the government assailed, until the independence of the insurgents has been acknowledged by that government, or until it has been practically achieved.

3. It is competent for any foreign nation, from the time when an insurrectionary force assumes to institute a form of government, and to carry on a war, to recognize the insurgents as a belligerent party.

Considerations of policy, as well as of comity, may well postpone such a recognition until there has been ample time for the government assailed to assert its power for the suppression of the insurrection. But these are matters of which each nation must judge for itself. Great Britain was the first to make such recognition of the Confederate States. France and Spain have since followed the example.

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* See Appendix, Note A.

In one sense, this is but the recognition of an existing fact. It seems, however, to carry with it something more than a mere acknowledgment of the fact that there is a state of civil war existing; for that fact may be recognized, spoken of, deplored, and sympathy expressed, as has been done by Russia, without any political consequences attached to such recognition.

The formal recognition of the insurgent party as a belligerent, by another nation, gives the insurgents a political *status* as to the party making the recognition, and involves consequences to the government which is attempting to suppress the insurrection, as has been already suggested. This recognition appears to be an action intermediate as regards the other two, and to be a convenient mode of dealing with a case of intestine war by a foreign nation which is desirous of being civil to the insurgent party, and of availing itself of all the intercourse which can be established with them, without committing itself to an acknowledgment of an independence which may never be achieved, and without the establishment of diplomatic relations, which might be suddenly terminated, and in a manner not greatly to the credit of the neutral, making the acknowledgment of an independence which was proved to be an abortion by the suppression of the rebellion very soon afterward.

As Great Britain was the first to acknowledge the belligerency of the Confederates, and as this acknowledgment is the only one which has affected the relations of the United States in any considerable degree, we shall pursue the residue of our discussion with a more particular reference to the existing relations between Great Britain and the United States. Her acknowledgment did not give the insurgents a right to send an ambassador to the Court of St. James, nor to claim a treaty of amity and commercial relations. It did not place them, as respects her, in the position of a nation. But, being acquiesced in by the United States, it gave her rights as against them which she could not have had, as a neutral nation, but for the recognition; and it also operated to give rights to the

insurgent government as against her, which she would not otherwise have permitted it to enjoy.

Great Britain declared that she was cognizant of the fact that a civil war existed in the United States. That is nothing. All the rest of the civilized world knew the same thing. But by adding the recognition, she accorded to them the warlike rights of a belligerent nation; and by her superadded declaration of strict neutrality, she allowed to them, for the general purposes of commercial intercourse and warlike operations, all the rights which she allows to the United States, aside from previous treaty stipulations. She bound herself to respect their "stars and bars" equally with the flag of the United States. If, in her existing treaty with the United States, there are any stipulations on her part, the performance of which would conflict with the recognition which she thus made, and the neutrality which she thus assumed, the question might arise, between her and the Confederates, how far she had a right, under the law of nations, to perform those stipulations without a breach of her neutrality. She knew that, at the date of her present treaty with the United States, all the ports in the seceding States, so called, were in the possession of the general government, and that the duties there paid were part of the common funds of the whole United States. She knew that at the time of her recognition those ports were in the possession of the insurgents, who claimed to regulate the commercial intercourse there, and to appropriate the revenues derived therefrom to other uses than to those of the United States. And she knew also how the revenue of the United States would be injuriously affected, by the facilities for smuggling into the Northern States goods introduced through those ports, if a free commerce were carried on there. Yet, by her recognition of the Confederate States as an existing power, she acknowledges those ports to be the ports of the party in possession, and claims the right, as a neutral nation, to enter those ports, and any others which may be opened by

the Confederate States, with her ships and goods, unless the United States government shall enforce its attempts to suppress the insurrection there by an efficient blockade, precisely as she would be authorized to do in the case of two long existing independent nations contending in war, and to which she held the relation of neutrality. The United States are attempting to keep up such a blockade.

It is true that the United States were not compelled to resort to the blockade by reason of her recognition. The intention to blockade was proclaimed on the 19th of April, which was before the recognition. But it is also true, we think, that that recognition, which was in May,* was in no manner influenced by the implied recognition arising from the blockade. Her recognition of the insurgents as a belligerent party has therefore, to this extent, by her voluntary act, given them the standing of a nation, although there is no acknowledgment of their independence. The blockade itself would not necessarily have done this; and but for the recognition, it might have been terminated at pleasure, so far as Great Britain was concerned, and any other measure of coercion have been substituted.

It has been said, without much consideration, that British ships would have had a right to resort to those ports without

* There has been an attempt to controvert the position in the article on "Habeas Corpus and Martial Law" in our last number, that Mr. Chief Justice Taney ought, in Merryman's case, to have taken notice of the existence of the war. The position itself is of very little importance to the argument, — which was to show that the refusal of General Cadwalader to produce his prisoner was sustained by sound principles; for the Chief Justice very plainly intimated that, if General Cadwalader had himself undertaken to suspend the *habeas corpus*, (in other words, to deny his liability to bring in his prisoner,) he would not have taken the trouble to argue the question. But it appears that the Lord Chancellor and other legal authorities in England had found out that war existed here some time before Merryman's case came before the Chief Justice, which was on the 28th day of May. And as the information respecting the facts which served to show its existence was not confined exclusively to that country, perhaps, if Mr. Chief Justice Taney had inquired, he might have found it out also.

any such recognition, if there was not an actual blockade, because, the right of secession being denied by the United States, they are still ports of entry under the laws of the United States, the President having no power to repeal the laws constituting them ports of entry. It is readily conceded that the President has no power to repeal a law; but we have already suggested that he might, by reason of the insurrection, which prevented the collection of the duties, and for the purpose of suppressing that insurrection, close the ports by a proclamation, which all foreign nations that did not recognize the belligerent *status* of the Confederate States would be bound to respect. If there was in fact a doubt respecting his constitutional power, the intercourse of foreign nations with the United States is through the Executive, and they are not authorized to go behind his acts, and to allege that they are nugatory, because under the provisions of the Constitution a power which he attempts to exercise is vested only in Congress.* There is no need, however, of saying this in a curt or spicy manner.

Moreover, without regard to any question of right legally to close the ports, foreign nations could not claim to enter those ports, as ports of the United States, after they had been notified by the Executive that they could not make their entries there under the authority of the United States, — that duties paid there would be paid to insurgents, — and that clearances there must be taken from parties at war with the United States; for which reason, and for the suppression of the insurrection, entries were forbidden.

But the burden of the recognition seems not to be altogether upon the United States. Great Britain appears there-

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* Mr. Jefferson Davis understands this. In his first message to the Confederate Congress, he said that the proclamation of President Lincoln was a plain declaration of war, which he was not at liberty to disregard, because of his knowledge that, under the Constitution, the President was usurping a power granted exclusively to Congress. "He is the sole organ of communication between that country and foreign powers."

by to have subjected her merchant-vessels not only to a right of visit to ascertain their nationality, but to a right of search and capture, in the same manner, and to the same extent, as she would have done had she acknowledged their independence. If the United States must accord to her the rights of a neutral nation, by an efficient blockade, in order to exclude her vessels from the Southern ports, they must certainly have the rights of a belligerent against a neutral, and may capture, in her merchant-ships, goods the property of the enemy, all articles known as contraband of war, and all persons whose carriage by the neutral is not in strict accordance with the neutrality.

The privateers commissioned by Mr. Jefferson Davis may, in like manner, search British merchant-vessels with similar rights, and for any abuse of the power her reclamation for damages is upon "King Cotton," if he is not in the mean time consumed by his own or some other fires.

Whether the Confederate privateers will also be authorized to capture such loyal citizens of the States which have seceded as may be found on board of British vessels, — but having no military or hostile character except as they are citizens of the United States, — and turn them over to the Confederate government as prisoners at twenty-five dollars per head, according to the tenor of the law under which they are commissioned, is perhaps not so clear. Upon the principle, or want of principle, of what the London Times now calls the "antiquated law," by which Great Britain claimed a right to search, and take her subjects from, the vessels of the United States, she would be bound to admit the right of the United States to take their citizens from her vessels; and giving equal rights to the Confederate States, the question would arise whether all citizens of the seceded States are included within the rule. This assumption of burdens, however, is her affair, not ours. We merely advert to it as one of the incidents which attends the recognition.

It seems very apparent, from what we have stated, that the recognition of the Confederate States as a belligerent power has substantially the effect of an acknowledgment of their independence, except that it does not authorize a demand of diplomatic intercourse and the formation of treaties. How far was such an early recognition justified by history?

The long civil war of her South American Colonies against Spain, and their establishment of independent governments *de facto*, required a recognition of them by the United States. Lord John Russell referred to the recognition of Greece, in her war against Turkey, as furnishing a precedent. We are not advised that he referred to any other. But the precedent fails entirely, except as to the fact of that kind of recognition. Greece had no share nor voice in the government of herself, still less in governing Turkey at the same time. She had not furnished three quarters of the Sultans who within less than a century had occupied the throne at Constantinople, and she had not, by one enginery or another, shaped the legislation of the great divan of the Turkish empire so as to suit her purposes, in three quarters of the political measures adopted there during the same time. No state had been annexed to the empire for her aggrandizement, and to give her political strength; and no war had been waged for the acquisition of Mexican or other territory in order that she might diffuse through it her peculiar institutions. On the contrary, she had been subjugated, though not entirely conquered; subdued, with the exception of the almost wild inhabitants of her mountain fastnesses; and ground into the dust by the iron heel of a military oppression which spared neither age nor sex, — which wrested from labor the reward of its toil, and snatched from hunger the morsel necessary to save it from becoming starvation.

This people rose up in their might against their oppressors, in 1821, reasserting their national existence; and after a warfare of more than four years, — a warfare of immeasurable atrocity

on the part of the Turks, and almost corresponding ferocity on the part of the Greeks, — a warfare which placed Missolonghi and Navarino on the page of history by the side of Marathon, and immortalized, among many others, the names of Mavrocordato, Colettis, Kanaris, Botzaris, and Miaulis, — the British government issued "a decided declaration of neutrality" between the belligerents.

The conclusion seems to follow, that the acknowledgment of a belligerent *status* of the Confederation, before the administration of President Lincoln had had time to determine upon its measures and organize its forces for the suppression of the insurrection, — with the attempt to carry on a neutral commerce with the ports within its limits, which ports are *de jure* still within the United States and under the jurisdiction of that government, and were only *de facto* without their jurisdiction, by the force of an insurrection of from four to six months' duration, — is entirely without a precedent, and might well be deemed a grave ground of offence to the United States, had not the blockade been previously instituted. It has undoubtedly been the cause of deep feeling among the people. We are aware that Dr. Phillimore says: "There is no proposition of law upon which there exists a more universal agreement of all jurists than upon this; viz. that this virtual and *de facto* recognition of a new state gives no just cause of offence to the old state, inasmuch as it decides nothing concerning the asserted rights of the latter. For if they be eventually sustained and made triumphant, they cannot be questioned by the third power, which, pending the conflict, has virtually recognized the revolted state." * But he is speaking of such recognitions as were made by Great Britain of the South American Colonies, after a struggle between them and Spain of about twelve years; and he refers to President Monroe's message of December, 1823, and to the speeches of Mr. Canning and Sir

* 2 Phill. on International Law, 18.

James Mackintosh upon that subject, as his authorities for the proposition.

A recognition following soon after the breaking out of an insurrection, and where from the peculiar circumstances there are special difficulties in organizing the forces of the government for the suppression of it, has the effect of giving an encouragement to it, which a nation in amity with the existing government, and desirous of continuing that relation, is not authorized to give.

The British government were as little prepared for the breaking out of the insurrection in India as the United States were for that of the South; but the arm of the government was not paralyzed, for the time, by a complicity of Cabinet officers with the insurrection, and by such a state of inaction, if not complicity, on the part of the head of the administration, that nothing effective could be accomplished to arrest it until the traitors of the Cabinet had been forced to send in their unwilling resignations. Besides, the available military force of the British near the scene of warlike operations was much more readily concentrated, and comparatively of much greater efficiency, than that of the United States; and (excepting native troops) it had few or no traitors in it. Still, with all these advantages, the British power in India was for a considerable period shaken to its foundation, and it was said in high quarters that "India was to be reconquered." Now suppose that, at about the time when Havelock began to move effectively for the suppression of the rebellion, some member of Congress had arisen in his place, and proposed a formal acknowledgment of the independence of British India. That would have been but the act of an individual legislator, who, not being the authorized exponent of the views of the administration, could in no wise compromise the government itself. But suppose the authorized Cabinet officials had thereupon, if not in hot haste, yet under no circumstances of necessity, proceeded to declare that the United States had concluded to recognize the king of

Delhi and his adherents as belligerents. The English government would undoubtedly have regarded this as an evidence of hostility, not entirely rebutted by any proclamation of strict neutrality which might have accompanied it. Yet such a proceeding would not have given courage and confidence to his Majesty of Delhi and his confederates to persevere in their rebellion.

Such are some of the relations of the United States, domestic and foreign, arising from the insurrection in the Southern States, as they exist at the present time. What are the reasonable speculations for the future on this subject?

The Confederate War Secretary, upon the occasion of the bombardment of Fort Sumter, prophesied that the Confederate flag would float over the dome of the old Capitol before the first of May; and he added: "Let them try Southern chivalry, and test the extent of Southern resources, and it might float eventually over Faneuil Hall itself." Well, Southern chivalry has been tried. It began by stealing all the public property it could lay its hands on, and then issuing letters of marque and reprisal before a particle of property had been taken by the United States, or any injury had been done to the Confederacy which could by any possible construction warrant *reprisals*. It has proceeded by the confiscation of the property of those who, having faith in the securities of Southern States and Southern people, had invested in such State securities, or given credit to traders for merchandise; and this without regard to any act done by such holders of stocks or creditors, but merely because certain people of the Southern States chose to rebel against the government of the United States, that government resisted the attempt, and the stockholders and creditors were, ever had been, and still remained citizens of the United States. Chivalry finds its only justification for this seizure of private property in the fact, that the government under which all the parties have heretofore lived, and to which all acknowledged a common allegiance, resists

the efforts of the debtors to accomplish a revolution. Chivalry has been tested in arms, as well as in legislation, and it manifests itself in masked batteries and ambuscades, the hoisting of false flags and signals, and all manner of false pretences for the purpose of securing an unequal advantage. Chivalry thus far is cooped up within the limits of the States seceding, except that, in violation of all its State-rights theory, it is insisting that Missouri and Kentucky, against the expressed will of the people of those States, shall join in the rebellion; and it has thereupon attempted to overrun the former, and has made a lodgement in the southern portion of the latter. As an offset to this, it has lost Western Virginia, considerable portions of the eastern part of that State, and several positions on the seaboard in other States. It stands now, and, so far as at present can be judged, it is likely to stand, very much on the defensive, unless Southern "resources" come to the rescue.

Thus far Southern resources have not shown to much better advantage than Southern chivalry. Proposals for a loan of fifteen millions of dollars are said to have realized ten millions. A project for a loan of cotton to the amount of one hundred millions is admitted to be a failure, because the "king" is shut up on a barren throne within his dominions, and cannot there be made negotiable. A tax of fifteen millions remains to be collected in such manner as it may be. In the mean time an issue of one hundred millions of Confederate bonds has no convertibility into coin, and no basis of redemption, and can therefore have no credit outside the limits of the Confederacy, and none within it except such as is enforced by the necessities of the war. Banks have suspended specie payments, and coin of all descriptions is at an extravagant premium. External trade is nearly all cut off by means of the blockade, a few arrivals and clearances, through a surreptitious evasion of it, furnishing only an exceedingly limited supply of munitions of war and foreign goods. Of

manufacturing and domestic trade there can, under these circumstances, be but a very small amount, except in connection with supplies for the army; and many descriptions of what are ordinarily regarded as the necessaries of life are, in particular districts, at almost famine prices. On the other hand, the agricultural crops for the present year are supposed to have been abundant, so that there is no prospect of the termination of the war by absolute starvation.

In discussing the question of the probable duration of the war, it has been suggested that the people of the South are fighting, or, what is the same thing, believe they are fighting, for their liberties; and that, in all controversies of such a character, there is a pertinacity of purpose, which continues the contest without resources, and under all deprivations and reverses, until a final victory is achieved. One of the resources of the leaders of the rebellion has been the representation to the great mass of their misguided followers, that this is a war of subjugation, and that, if they fail to fight to the last extremity, their liberties will be lost. But the sober second-thought, if that thought ever comes, will show them that the termination of the war will leave the several States which have attempted to secede in the possession of all their rights of sovereignty, and in all the control of their municipal affairs which they have ever had since the adoption of the Constitution, — except so far as the rebellion has introduced revolution into any particular State, through which some of them may possibly find themselves dismembered by the action of their own people, — and except as the situation and legal condition of their slaves may, to a very material extent, be changed, if the war is protracted.

That the war must continue on the part of the North until the navigation of the Mississippi, from its sources to its mouth, is secured to the people of the Northwest, so that no hostile power upon its banks can impede such navigation, or until the Northern States are rendered powerless to prosecute the

contest to a successful issue, may be assumed to be certain. The promptitude with which batteries were erected on the banks of that river immediately after the outburst of the secession, for the purpose of controlling and closing the navigation of it, and thereby coercing the people of the Northwestern States into submission to the rebel power, shows conclusively that there can be no security for the free navigation of it except by holding it, and its banks on either side, within the jurisdiction of the United States. The great facilities for smuggling, through the entry of goods into the Southern ports and their subsequent introduction into the North along such an extensive line of inland frontier as would exist on a separation of the States, — and the fact that rival interests would create sources of constant irritation, — furnish other reasons why the eventual establishment of the authority of the United States must be sought by the Northern States, even through a protracted contest, and at an enormous sacrifice. With victory secured, the North would rise up with renewed energy, and with its own material interests comparatively unimpaired, except by a decrease in the demand for articles heretofore furnished to the South.

Not so with the South. With a protracted contest, even victory is a substantial defeat. Cotton, which has been supposed to be the great resource to carry them through the revolution, has, as we have seen, thus far proved a failure. It cannot be applied as a means to carry on the war to any great extent, except by a conversion into money or other articles; and as this could not be effected, the crop of the present year remains on hand. Only a certain amount of cotton, more or less, is required for the consumption of the world, and this crop, if it could have found a market, would have supplied the demand in England, France, and the Northern States. With the diminished demand for manufactured articles, the supply from other quarters has thus far sufficed, so that no great distress has supervened from the want of Southern cot-

ton; not more, probably, than ordinarily occurs in the course of a commercial revulsion, perhaps not so much. Another full crop, if raised before this is disposed of, will operate as a reduction of its ordinary value, by furnishing an excess of supply for the existing machinery. In the mean time, every year's delay in getting it to market stimulates the cultivation of cotton abroad. If the present state of things continues two or three years, the competition of foreign cotton will reduce the price to perhaps two thirds, or even one half, of the rate heretofore paid; and with this reduction comes a corresponding reduction in the value of slaves and the value of plantations. It is for the interest of Great Britain to foster and protect the growth of cotton in her own dominions, and the production of a sufficient amount within her territory once secured, American cotton will not be allowed to ruin that source of national wealth.

Another resource of the South, which has thus far been the means of strength in the prosecution of the war, is slavery. The slaves are the producers, and the masters can all the better be spared to fill the ranks of the army. It will continue to be so until the troops of the United States penetrate the slave territory. Until that time, proclamations for emancipation, from whatever source, will be of no avail. The President and Congress have no more authority to emancipate the slaves, than the writer of this article. An attempt so to do would be a gross usurpation of power. The general at the head of the army has no right to emancipate them, except as an incident to military occupations and operations; and whatever theory may exist on that subject, he can accomplish nothing further than he penetrates the country. So far as he does this, the question of his right to issue a proclamation for that purpose is not very material. The emancipation will take care for itself. He cannot fight the rebels successfully, and at the same time aid them to hold their slaves; and the result is practical freedom. If they avail themselves of it, be-

cause their masters have escaped from them, then there is no fugitive slave law to return them after the rebellion is suppressed. But if they remain until their masters have resumed their occupation under State authority on the return of peace, this practical freedom is not likely to prevent their return to bondage. When, however, the Northern army has made a successful march through Virginia into South Carolina, there is another result, which, while it cannot be contemplated but with horror, must, if it occur, be charged to those whose madness will have brought it upon them.

The great resource upon which the South has relied to carry it successfully through a revolution, has been the interference of Great Britain and France. It was assumed that cotton was a king at whose feet the people of Europe must prostrate themselves and their principles, and that, if Southern chivalry could not fight its own battles, they would, through this instrumentality, be fought for it by other powers. It remains to be seen whether this resource will be made available to the accomplishment of the object. What is the probability of such interference?

Without assuming the office of a prophet, we venture to express a confident belief that there will be no immediate change in the relations which at present exist between the United States and foreign powers, unless some new, and at present improbable, complication of those relations shall give rise to new and grave causes of hostility.

The sympathy of Russia with the United States has been manifested in a most friendly and generous manner.

Spain, not only in her proclamation of neutrality, but in the enforcement of it by the release of the prizes sent into Cienfuegos by the privateer Sumter, has given conclusive evidence that she has no sympathy with the rebellion.

With respect to France, there has been no supposition that there was danger of collision. The course thus far pursued by Napoleon III., and by the people of the French empire, while

it has evinced a deep solicitude respecting the effect which the civil war might have upon the material interests of France, has at the same time furnished satisfactory evidence that the French government and the French people — with some exceptions certainly among their press and people — are disposed to accord to the United States all their rights, upon the most fair interpretation of the law of nations.

What is the probability that Great Britain will belie all her professions in favor of free principles, and tarnish her fair fame by an alliance with a rebellion, which, caused almost entirely by the opposition of the North to the extension of slavery, has organized a Confederacy with slavery for its chief corner-stone, and which, if successful in establishing its independence, will soon insist upon opening the slave-trade ?

There are certainly no grave causes of controversy or hostility between the United States and Great Britain. More than two generations of mankind have passed away since the period of the American Revolution, and very few remain within the confines of this world whose fading memories retain even a faint remembrance of that contest. The controversies which led to the war of 1812 have either been amicably settled, or have fallen out of sight, and there can be no rankling bitterness which arose out of them still remaining to find expression in the promotion of another war. Most of those who, on either side, were actively engaged in that contest, have laid their hostility to rest in the bosom of their common mother, — earth. That all causes of difference arising from two wars, and from divers controversies respecting boundaries, and other matters of dispute, had left no evil feeling on the part of the people of the United States, or at least the Northern and Western portion of them, was made most clearly apparent upon the occasion of the visit of the Prince of Wales to this country in 1860. There could not possibly be a more exuberant manifestation of perfect friendship than was exhibited, not only by all persons in official station, but by the great masses

of the people, of all classes and conditions, from the time when the heir apparent set his foot upon the soil of Michigan, until the moment when it left its last imprint upon that of Maine on his departure homeward. If there was any one who was weak enough to suppose that the grand pageant, which continued almost without interruption from day to day during his progress through the country, — in which President and Cabinet, governors and judges, senators and representatives, vied with one another in proffers of respect and courtesy, and in which the great body of the people made the welkin ring with their shouts of welcome, — was a mere demonstration of joy at the sight of a live prince, or a weak cringing to royalty, he must have greatly misunderstood the signs of the times. The enthusiasm, which seemed almost unbounded, while it was undoubtedly a spontaneous testimonial of respect to the Queen, showing the popular estimation of her Majesty as a sovereign, a woman, a wife, and a mother, was at the same time a demonstration of gushing good feeling for the government of the country and its people at large. Old causes of feud were forgotten, — rival industrial interests were for the time but as matters for a generous competition, — taunting words, which in bygone days had been profusely dispensed, gave place to courteous speech, which not only came trippingly from the tongue, but which welled up from the heart.

There was certainly no little cause for astonishment, and there might well be no little revulsion of feeling, on the part of the people of the Northern States, when, within some six months afterward, and before the incoming administration had time to make preparations for suppressing the insurrection, there was an effort in Parliament to give strength to it, by an acknowledgment of the independence of the Confederacy, and the establishment of commercial relations with it, which found large countenance from the English press.

It may be admitted — it is undoubtedly true — that much of this offensive demonstration had its origin, not in feelings

of hostility, but in a belief that the rebellion must succeed, and in anticipated commercial relations with the new-born power thus proposed to be baptized into the great national and commercial church universal; which was — even upon the supposition of its existence — the offspring of treason and fraud, lying in a cradle constructed by theft and robbery, and rocked and nursed by African slavery.* But it appeared somewhat remarkable that the wise politicians who were thus willing to overlook the stigma upon the parentage of the bantling for which they were ready to stand as political godfathers, should at the same time have ignored the fact that the commercial intercourse of the Northern States was of some value to Great Britain, and that this was likely to be seriously interrupted at no distant day, if their project was accomplished. It may be, however, that they supposed, with the London Economist, that the dismemberment of the Union would paralyze both sections. The Economist, while disclaiming any feeling of hostility, very frankly admitted its joy at the prospect of the dismemberment, not merely on account of the commercial advantages to accrue to England, but because it would destroy the power of the people of the United States, and put an end to their vain boasting. As for the "boasting," it is quite true that in speeches in Congress, in inflammatory editorials, in fourth of July orations, lyceum lectures, and sometimes in things called sermons, we exhibit enough, and more than enough, of that miserable spirit; no small portion of it being (if regarded at all) offensive to England and Englishmen, although it is specially designed for home consumption. But there are at least two things to be considered in extenuation. We know what people, of all the world, have heretofore set us the example in this respect; and we know also from what people in bygone and later days have come the taunts and the disparagement which have given rise to no small portion of it. But when we gave the Prince of Wales his great ovation, we were not thinking of the old

inquiry, "Who reads an American book?" nor of the characteristics which have more recently, over the water, been assigned to "our American cousins" and their democratic government. Whatever may have been said by politicians in Congress or out of Congress, or by newspaper correspondents or editors, or in great and small orations, furnishes no good reason why Great Britain should interfere on the Confederate side, in this civil war. A full share of this offensive boasting has had its location south of Mason and Dixon's line.

It was for a long time expected by the Southern leaders that Great Britain would raise the blockade to procure a supply of cotton, and great efforts were made to represent that it was not efficient. We had been at some pains to procure statistics on which to base a trustworthy estimate of the supply of cotton which will be received in Great Britain in 1862 from other sources than the Southern States, for the purpose of showing that her necessities in this respect would furnish no excuse for any such interference. No evil, such as ordinarily attends a commercial crisis, could furnish a sufficient reason. But we are relieved from a discussion of this subject by the London Economist, which — referring to the notion of the Southern political leaders, "that by starving France and England, by the loss and suffering anticipated as the consequences of an entire privation of the American cotton supply, they will compel those governments to interfere on their behalf, and force the United States to abandon the blockade" — says: —

"If they really expect such a high-handed violation of all international usage on our part, we can only say their leaders are less sensible and experienced men than we have hitherto supposed. There is not the remotest chance that either power would feel justified for a moment in projecting such an act of decided and unwarrantable hostility against the United States. We are less dependent upon the South than the South is upon us, as they will erelong begin to discover. It is more necessary for them to sell, than for us to buy. As we have

more than once shown, the worst that can happen to us from a continuance of the blockade will be, that our mills will have to work two-thirds time; and it is by no means sure from present appearances whether the aggregate demand of the world would suffice to take off much more than three fourths of a full production, even if we had cotton in abundance."

The allegation that the blockade has not been so far effective as to comply with the rules of international law on that subject, if it may have been true at some places, has not been so to the extent which has been represented. The blockading force has in most instances been sufficient to make any open attempt to enter or leave the port dangerous. The number of arrivals and departures, which has been paraded as evidence of its inefficiency, furnishes no proof against it. Nearly all of them have been fraudulent evasions of the blockade.

It is not incumbent on the party instituting a blockade to station a force at all the inlets and petty harbors on the coast, where there is no recognized port; where no entry could be made, or clearance had, in time of peace; and where, of course, if any commerce were carried on, it would be smuggling, and not a lawful commerce. Any running into and out of such places, in order to avoid the danger of the blockading force, is fraudulent, and has no tendency to show that the blockade is not effective.

Nor is it necessary that the blockading force should be such that a vessel, taking advantage of a skilful pilot and the darkness of midnight, cannot make her entry, or exit, without being discovered. To require such a blockade would be to require an impracticability. Vessels navigated by steam, to say nothing of sailing-vessels, by selecting their time, can in many instances run a blockade.

Whether the contrivances to evade the blockade are by the petty codfish hucksters of the Anglo-American colonies, who fraudulently clear for some of the West India Islands, and then slyly slip into Hatteras or some other inlet; or whether

by the more pretentious "greedy merchants" of Hartlepool or some other "pool" on the English coast, "who care not how things go, provided they can but satisfy their thirst of gain,"* and who, violating at the same time the laws of their own government and those of the United States, the vaunted principles of British freedom and the proprieties of national intercommunication, sneak, in the darkness of night, into the harbor of Savannah or of Charleston, for the sake of acquiring the "almighty dollar" with the love of which they delight to taunt the Yankees; — it does not rest with Great Britain to allege that the success of such attempts, however numerous, by those whom she must admit to be, thus far, her unworthy subjects, can show an insufficiency of the blockade.

Almost at the time when we were writing the last sentence, the foreign relations of the United States were further complicated by the seizure of Messrs. Mason and Slidell, on board the British steamer Trent, on her passage from Havana to St. Thomas, she being at the time on the high seas, and being (it is understood) a passenger vessel, owned by private parties, but carrying the British and foreign mails by contract with the government.

Messrs. Mason and Slidell had recently left the port of Charleston, in a vessel belonging to parties there, for the purpose of proceeding to Europe, by way of Havana, as "Ambassadors of the Confederate States," as they have generally been called; but a more correct designation would be, as the agents or commissioners of the Confederate government, for the purpose, it may be presumed from other facts too numerous here to be stated, of obtaining, if possible, an acknowledgment of the independence of the Confederate States, — of communicating with their agents already there, — and of aiding in the adoption of such measures as might promote the interests of those States in the existing war with the United States, by ne-

* Puffendorff, cited by Sir William Scott, 1 Rob. Adm. Rep, 352.

gotiations for the purchase of arms and munitions of war, and their transportation to the ports of the Southern States.

Mr. Jefferson Davis, in his late message to the Confederate Congress, speaks of them as "the distinguished gentlemen whom, with your approval, at the last session, I commissioned to represent the Confederacy at certain foreign courts"; and he charges the United States with having "violated the rights of embassy, for the most part held sacred even among barbarians, by seizing our ministers whilst under the protection and within the dominions of a neutral nation." It may be noted that this shows conclusively that their original destination was Europe, — that their proceeding to Havana in the first instance was merely for security, or convenience, and transshipment, — and thus that their voyage on board the Trent was merely a continuation of a voyage from Charleston to Europe. They were bearers of despatches, also, of the character of which we shall speak hereafter.

From this designation of them as "Ministers" and "Ambassadors," in the message, and elsewhere, it was but a matter of course that much of the discussion, in the papers of the day, has been upon the question of the right of a belligerent to stop the *ambassador* of his enemy. The right is asserted by Vattel. It is reasserted by Sir William Scott, in this language: —

"I have before said, that persons discharging the functions of ambassadors are, in a peculiar manner, objects of the protection and favor of the law of nations. The limits that are assigned to the operations of war against *them*, by *Vattel*, and other writers upon those subjects, are, that you may exercise your right of *war against them*, wherever the character of hostility exists. *You may stop the ambassador of your enemy on his passage;* but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of *middle*-man, entitled to peculiar *privileges*, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested." — *Case of the Caroline*, 6 Robinson's Adm. Rep. 467, 468.

The doctrine thus stated may, as between England and the United States, be regarded as a sound principle of international law.

"You may stop the ambassador of your enemy on his passage"? When, and where, and on what passage, may you stop him? It has been argued, in reference to this case, in substance, that he may be stopped only while in his own country, or while passing through the country with which his government is at war, or on the high seas in a vessel of his own country; and that in this case the stoppage was unlawful, because the ambassador when in a neutral vessel is in a neutral territory. Mr. Jefferson Davis falls into this error. He speaks, as appears in the extract above quoted, of seizing "our ministers while under the protection and within the dominions of a neutral nation"; and he adds, that "a claim to seize them in the streets of London would have been as well founded as that to apprehend them where they were taken," which shows that he has no very correct notions upon the subject. It is readily perceived that no possible question could arise respecting the right to stop the ambassador of your enemy, as you may stop any other enemy, when you find him in the enemy's territory; or if he attempt to pass through your own, on his way to his destination. There is as little doubt that you may not interfere with him while in neutral territory, without just cause of offence to the neutral power whose territory protects him; and no question whatever that a neutral vessel on the high seas is, as respects belligerent rights, in no just sense neutral territory. The right in time of war to search a neutral vessel which may reasonably be supposed to have contraband goods on board, and to capture and confiscate the vessel, as well as the goods, shows conclusively a marked distinction between the vessel and the territory of the neutral, the latter not being the subject of search, and of course not of seizure and of confiscation, on the ground that munitions of war are found there, — even with evidence that they were intended to be conveyed

to the enemy. The question of contraband, or not, does not arise until the goods are on their transit, and out of the local neutral jurisdiction. If then, as a matter of international law, you may stop the ambassador of the enemy, you may stop him on his outward passage while on board a neutral vessel.

But the further question immediately presents itself, May you stop him in all cases where you find him thus in the neutral vessel, and if not, upon what voyage must he be found in order to the exercise of this right? Vattel and the text-writers, in laying down the proposition, could not have contemplated merely the case of a stoppage on a voyage from one port of the enemy to another port belonging to him, because the passage of an ambassador is not ordinarily of that character. Sir William Scott evidently did not so apply it, because he was not speaking with even the most remote reference to any such case. He added, as we have seen, "But when he has arrived, and has taken upon himself the functions of his office"; showing that the "passage" he had in contemplation was a passage to the place where he was to exercise those functions. This shows also that the principle is not applicable merely to an ambassador returning in a neutral vessel to his own country after his functions have ceased; nor to the case of an ambassador who, after his reception at the neutral court, is proceeding to another neutral port, for a temporary purpose, on private business, — for that is the very case of all others, if there be one, in which you cannot stop him, because his character of ambassador may be held to continue, and protect him, as if he were still in the neutral country to which he is accredited.

The conclusion would seem to be, that he may be stopped in a neutral vessel, on the high seas, on his way to the country to which he is sent, before his arrival and reception, and before, therefore, he is entitled to the protection of the neutral nation to which he is accredited. And if he may be stopped when proceeding directly from his own port in a neutral ves-

sel, it is not material, so far as the right to stop is concerned, that he has touched at an intermediate port, for the purpose of greater supposed security, and for transshipment. His character of hostility exists as much in the one case as in the other, and it is only when he has arrived in the country in which he is to exercise his office, that this character of hostility ceases, and that of a "*middle*-man," entitled to peculiar privileges, attaches to him, and the neutral territory protects him. But if he is received on board at a neutral port, with no circumstances to excite suspicion that any character of hostility attaches to him, that may well affect the question whether the vessel is liable to confiscation.

It is true that the case of the Caroline was one in which the question related to the carriage of despatches from the Minister and Consul of France in the United States to the government of France; and it has been objected that the remarks of Sir William Scott on this subject were therefore mere *obiter dicta*, that is, the expression of his opinion. But he was led by the case to consider this very subject, and it is evident from the context and the citation from Vattel, that it was a well-considered opinion. So the text-writers, so far as they speak of the principle, have received it; for they have promulgated the rule, as thus stated, without doubt or question. At least, we have not seen or heard of anything to the contrary.

We are aware that in the same case Sir William Scott, speaking of despatches, says: —

"The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake in any degree of the nature of hostility against you. The enemy may have his hostile projects to be attempted with the neutral state; but your reliance is on the integrity of that neutral state, that it will not favor nor participate in such designs, but, as far as its own councils and actions are concerned, will oppose them. And if there should be private reason to suppose that this confidence in the good faith of the neutral state has a doubtful foundation,

that is matter for the caution of the government, to be counteracted by just measures of preventive policy, but it is no ground on which this court can pronounce that the neutral carrier has violated his duty by bearing despatches, which, as far as he can know, may be presumed to be of an innocent nature, and in the maintenance of a pacific connection."

But these remarks will not apply to an ambassador for the first time on his passage. If he is proceeding, in time of war, upon an embassy to another nation, even a neutral nation, he goes as a high official, to support the interest of his country there in relation to the war, as well as other matters, and his character is necessarily that of hostility. When he arrives, the neutral territory will protect him; and then perhaps it is not to be presumed that his communications *to the neutral government* are those of hostility, and that you are to place reliance upon the integrity of that government.

We have stated this matter thus at large to show that, on the express statement of the official organ of the Confederate government, these persons were not mere peaceful passengers on their private business, as they seem inclined to represent themselves in their "protest"; and that, if they had possessed the official character which their commissions assumed to confer upon them, they would have been liable to capture.

But these persons were not ambassadors; — no question respecting the rights of an ambassador, or the protection of an ambassador, is brought directly in question by the seizure; — and the case of the United States is all the stronger because they were not entitled to that character.

The right to send an ambassador, and of course to confer the privileges of an ambassador so far as the party sending has the power so to do, is a national right, and not a belligerent right. And as neither the British government, nor any other government, had acknowledged the nationality of the Confederate States, the latter were not authorized to commission an ambassador.

Messrs. Mason and Slidell were public agents of the Confed-

erate States of high official standing, — commissioners, bearers of despatches to other agents of those States already abroad, and charged with other errands of hostility to the United States, — designated as ambassadors, but possessing neither the character nor the privileges of that office. The general question then comes, May such hostile agents of the enemy — proceeding from the enemy's country in an enemy's vessel, but, for the purpose of avoiding capture, stopping in the territory of one neutral, and there transferring themselves to the vessel of another neutral — be stopped and captured while they, with their despatches, are on board the latter vessel, not having arrived at any territory occupied by that neutral? This is the first general question.

It may be admitted that there is no precedent which precisely covers all the facts of this case; and we are therefore put upon the inquiry, What is the true principle applicable to this new state of facts, and by which the question is to be solved?

Asking our readers to bear in mind what we have already stated in regard to the rights, duties, and obligations of neutrals, we proceed to further citations from the opinions and judgments of Sir William Scott, expressed and rendered in 1807, which were not only binding decisions at the time, determining the disposition of very large amounts of property, and then received as sound expositions of law by the British crown and people, but which have since been generally regarded as authority by the best elementary writers in England and in this country.* So far as we are aware, they commanded the entire confidence of British statesmen and lawyers, until within perhaps the last thirty days. The estimation in which Sir William Scott was held by the British government appears from the fact, that he was afterward raised to the peerage, with the title of Lord Stowell. Our apology for occupying so much of our

* See 3 Phill. Int. Law, 368 – 373; 1 Kent, 152, 153; Wheaton's Int. Law, Part IV. Chap. 3, Sect. 25.

space with these extracts is, that the volume in which the judgments are published is not of ready access to general readers.

Case of the Orozembo, 6 Robinson's Adm. Rep. 430–439. This was a case of an American vessel,

"that had been ostensibly chartered by a merchant at Lisbon, 'to proceed in ballast to Macao, and there to take a cargo to America,' but which had been afterwards, by his directions, fitted up for the reception of three military officers of distinction, and two persons in civil departments in the government of Batavia, who had come from Holland to take their passage to Batavia, under the appointment of the government of Holland. There were also on board a lady and some persons in the capacity of servants, making in the whole seventeen passengers."

"*Sir William Scott.* . . . . . That a vessel hired by the enemy for the conveyance of military persons is to be considered as a transport subject to condemnation has been in a recent case held by this court, and on other occasions. What is the number of military persons that shall constitute such a case, it may be difficult to define. In the former case there were many, in the present there are much fewer in number; but I accede to what has been observed in argument, that number alone is an insignificant circumstance in the considerations on which the principle of law on this subject is built; since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces at Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater, and, therefore, it is what the belligerent has a stronger right to prevent and punish. *In this instance the military persons are three; and there are, besides, two other persons, who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which the question has been agitated; but it appears to me,* ON PRINCIPLE, *to be but reasonable that, whenever it is of sufficient importance to the enemy that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations.*

"It has been argued, that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him, or his owner. But I conceive that is *not* necessary. It will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. In the case of the Swedish vessel there was no *mens rea* in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion, put upon him by the officers of the French government, and, so far as intention alone is considered, *perfectly innocent.* In the same manner, in cases of *bona fide* ignorance, there may be no actual delinquency; but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation. . . . . .

"*If it has appeared to be of sufficient importance to the government of the enemy to send them, it must be enough to put the adverse government on the exercise of their right of prevention.*"

Case of the Atalanta, 6 Rob. Adm. Rep. 440 – 460.

"*Sir William Scott.* . . . . . This being the fact then, that there were on board public despatches of the enemy, not delivered up with the ship's papers, but found concealed, it is incumbent on the persons intrusted with the care of the ship and her cargo to discharge themselves from the imputation of being concerned in the knowledge and management of this transaction. . . . . .

"Not to have pointed them out to the attention of the captors amounts to a fraudulent dissimulation of a fact, which, by the law of nations, he was bound to disclose to those *who had a right to examine, and possess themselves of all papers on board.* . . . . .

"That the simple carrying of despatches between the colonies and the mother country of the enemy is a service highly injurious to the other belligerent, is most obvious. . . . . It is not to be argued, therefore, that the importance of these despatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced

by operations strictly military. How is this intercourse with the mother country kept up in time of peace? By ships of war, or by packets in the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state, and is justly to be considered in that character. Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. . . . . .

"Unless, therefore, it can be said that there must be a plurality of offences to constitute the delinquency, it has already been laid down by the Superior Court, in the *Constitution*, that fraudulent carrying the despatches of the enemy is a criminal act, which will lead to condemnation. Under the authority of that decision, then, I am warranted to hold, that it is an act which will affect the vehicle, without any fear of incurring the imputation, which is sometimes strangely cast upon this court, that it is guilty of *interpolations* in the laws of nations. If the court took upon itself to assume *principles* in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases cannot surely be so considered. All law is resolvable into general principles. The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not *new*, nor is it justly chargeable with being *an innovation* on the ancient law; when, in fact, the court does nothing more than apply old principles to new circumstances. . . . . .

"To talk of the confiscation of the noxious article, *the despatches*, which constitutes the penalty in contraband, would be ridiculous. There would be *no* freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle. . . . . .

"The general rule of law is, that where a party has been *guilty of an interposition in the war*, and is taken *in delicto*, he is not entitled to the aid of the court to obtain the restitution of any part of his property involved in the same transaction. It is said that the term

'interposition in the war' is a very general term, and not to be loosely applied."

Case of the Susan, 6 Rob. Adm. Rep. 461, note.

"The Susan, an American vessel, captured on a voyage from Bordeaux to New York, having on board a packet addressed to the Prefect of the Isle of France (of which it did not appear that it contained more than a letter, providing for the payment of that officer's salary). The master had made an affidavit, averring his ignorance of the contents, and stating that the packet was delivered to him by a private merchant, as containing old newspapers and some shawls, to be delivered to a merchant at New York. The insignificance of such a communication, and its want of connection with the political objects of the war, were insisted upon. But the court overruled that distinction, under observations similar to those above stated; and on the plea of ignorance observed, that, without saying what might be the effect of a case of extreme imposition practised on a neutral master, notwithstanding the utmost exertions of caution and good faith on his part, it must be taken to be the *general rule*, that a master is not at liberty to aver his ignorance, but that, if he is made the victim of imposition, practised on him by his private agent, or by the government of the enemy, he must seek for his redress against them."

Case of the Caroline, (from which citations have already been made,) 6 Rob. Adm. Rep. 461–470.

"This was a case of the same general class as the preceding, on the question of *despatches*, found on board of an American ship, which had been captured with a cargo of cotton and other articles, on freight on a voyage from New York to Bordeaux. In this case the despatches were those of the French Minister and the French Consul in America, going to the departments of government in France."

"*Sir W. Scott.* . . . . . In this case a distinction was taken, very briefly, in the original argument, which I confess struck me very forcibly at the moment, that carrying the despatches of an ambassador, situated in a neutral country, did not fall within the reasoning on which the general principle is founded; and I cannot but say, that the further argument which I have heard on that point, and my own consideration of the

subject, have but confirmed the impression which I then received of the solidity of this distinction. . . . . .

"It has been asked, What are despatches? To which, I think, this answer may safely be returned: that they are all official communications of official persons on the public affairs of the government. The comparative importance of the particular papers is immaterial, since the court will not construct a scale of relative importance, which in fact it has not the means of doing, with any degree of accuracy, or with satisfaction to itself. It is sufficient, that they relate to the public business of the enemy, be it great or small. . . . . It is not to be said, therefore, that this or that letter is of small moment; the true criterion will be, Is it on the public business of the state, and passing between public persons for the public service? *That* is the question. . . . . But if the papers so taken relate to public concerns, be they great or small, civil or military, the court will not split hairs, and consider their relative importance. . . . . .

"The circumstances of the present case, however, do not bring it within the range of these considerations, because it is not the case of despatches coming from any port of the enemy's territory, whose *commerce* and communications of every kind the other belligerent has a right to interrupt. They are despatches from persons who are in a peculiar manner the favorite objects of the protection of the law of nations, *ambassadors*, resident in a neutral country, for the purpose of preserving the relations of amity between that state and his own government. . . . . .

"It has been argued truly, that, whatever the necessities of the negotiation may be, a private merchant is under no obligation to be the carrier of the enemy's despatches to his own country. Certainly he is not: and one inconvenience, to which he may be held fairly subject, is that of having his vessel brought in for examination, and of the necessary detention and expense. He gives the captors an undeniable right to intercept and examine the nature and contents of the papers which he is carrying; for they *may* be papers of an injurious tendency, although not such, on any *a priori* presumption, as to subject the party who carries them to the penalty of confiscation, and by giving the captors the right of that inquiry, he must submit to all the inconvenience that may attend it. Ship and cargo restored *on payment of captors' expense.*"

It will be found, we think, from a careful examination of these opinions, that the general principle applicable to the case is, that the subject or citizen of the neutral nation may not do anything directly auxiliary to the warlike purposes of a belligerent, or, as it is expressed in other words, anything which has a direct tendency to promote his warlike operations; and that the transportation of agents whose business is to promote or facilitate any hostile operations, or of despatches which have, or may be presumed to have, a hostile character, is a rendition of aid to the belligerent which justifies the capture of the persons and despatches, and if done with knowledge, actual or constructive, is such a violation of neutrality as authorizes the capture and confiscation of the neutral vessel.

Speaking of the right of search, it has been said: "The only security that nothing is to be found inconsistent with amity and the law of nations is the right of personal visitation and search, to be exercised by those who have an interest in making it." We have here another expression of the general principle which regulates neutral rights and duties. It is not merely that the neutral is not warranted in carrying this or that article, or this or that person. He is not to carry anything which is inconsistent with the amity which subsists between his nation and the belligerent, and which he should maintain toward the belligerent.

Having ascertained the principles which are applicable, we turn again to the facts of this case. Probably no one doubts that Messrs. Mason and Slidell were the public agents of the Confederate States, charged with all manner of duties of a belligerent character. But Great Britain may reasonably ask for some evidence of the fact, as a justification for their removal from the Trent. The proof will doubtless be found to be abundant, but our space permits only two or three suggestions. In the first place, there is the message of Mr. Davis, in which he states that they are commissioned, and speaks of them as "Ministers," showing them to be public agents for

the promotion of the interests of the revolutionary government.

In the next place, there is a conclusive presumption that their agency was of a belligerent character, because the people of the Confederate States, being in rebellion, waging a civil war, and acknowledged only as a belligerent power, whatever is to be done for their success is necessarily of a belligerent character. The voyage of their agents to Europe was "directly auxiliary to the warlike purposes" of the Confederacy, and as hostile as if they had been officers or soldiers on their way to aid the enemy. An attempt merely to procure an acknowledgment of the independence of the Confederate States, while the United States are surrounding them with forces by land and sea, is of itself an act of hostility to the United States. The object could only be encouragement and aid in the prosecution of the war, as there is no practical independence.

Similar remarks apply to the despatches. That such documents were on board is not now concealed. The failure of Captain Wilkes to find them has been a matter of exultation. Lieutenant Fairfax was not bound to search for them after the captain of the Trent refused to show his passenger list or to give any information. He might well suppose that they were then beyond reasonable search, perhaps concealed by some of the ladies connected with the agency, in what the Boston Post, speaking of the secret transmission of traitorous correspondence by Secession ladies in the vicinity of Washington, termed "the holy precincts of their nether garments." The Confederate States had no minister, nor any consul, in Europe; but they had agents there actively attempting to procure an acknowledgment of their independence, and engaged in purchasing and transmitting munitions of war to the Southern ports. The despatches, then, must be presumed to relate to these subjects.

The fact that the voyage of the neutral vessel was from one

neutral port to another would not have exempted these persons from capture, even if they had been ambassadors from a recognized nation, their mission being of a hostile character. *A fortiori*, it cannot exempt them when they are mere agents. The character of hostility which necessarily attaches to them as the public agents of a mere belligerent power, proceeding with despatches which from the nature of the case must be presumed to be to hostile agents and for hostile purposes, shows a right to capture them, even if an ambassador might be exempted on such a voyage because he was a "*middle*-man." We have the distinct opinion of Sir William Scott that the transportation of civilians may be ground of forfeiture.

The neutral vessel was rendering aid in the accomplishment of these hostile purposes, just as much as she would have been if her voyage had been direct from the belligerent port. The neutral right, therefore, cannot protect the hostile agent, whether there was or was not knowledge. The want of knowledge might protect the vessel. But here was ample evidence to charge the captain of the Trent with full knowledge of the character of hostility; and it may probably be shown that the embarkation at Havana was with sufficient pomp and circumstance to constitute plenary evidence, if there were no other.*

The Trent was a private passenger packet, with the advantage of a contract to carry the mails. She was a common carrier of passengers, and perhaps of goods also, but had no more of the character of a government vessel than the railroad car which carries the mail and the mail-agent, under a contract with the postmaster-general, has the character of a government vehicle. She was therefore liable, under the circumstances, to capture, and to confiscation also.

But here comes another, and it would seem, from recent suggestions, the main point to be considered. The Trent was

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* See Appendix, Note B.

not captured. It is said that for this reason the proceedings are all irregular, and that a demand for a delivery of the prisoners is to be made by the British government, founded upon the neglect to make the capture, and the consequent lack of any proof of a right to take the persons. This is quite too narrow a view of the matter, and we shall not believe, until we have demonstrative assurance, that the law officers of the Crown will place themselves upon such a small and slippery foundation. We shall not enlarge upon the ill grace with which Great Britain would urge the objection, not that Mason and Slidell could not be taken, but that Captain Wilkes did not capture the steamer, send her in for trial and confiscation, and in so doing delay her Majesty's mails, and derange the business of all the passengers and others concerned in the regular trip of the vessel, — that there was therefore no adjudication of a prize court to show that the persons could be captured, and no other evidence would be received. Nor need we show what a gross outrage it would be to fasten a quarrel upon the nation whose officer had been guilty of such an act of comity and favor. If blood ever cries to Heaven for vengeance, it would be the blood shed in a war having such a foundation. And if all Christendom did not cry, Shame! it would show that the part of it which failed in the performance of that duty to humanity had lost all consciousness of the difference between right and wrong. Such a failure to do Great Britain an injury may possibly be made a *pretext* for war. It can never be the foundation of a *point of honor*, requiring an apology.

But it is argued, that in no other way than by sending in the vessel can it be shown by regular proof that the right to seize these persons existed; and therefore, that, by reason of the failure to send in the vessel, we cannot establish the right of seizure. It is alleged that it has always been the law of the world, that every cruiser making a seizure on board of a vessel shall bring the vessel in, and subject the lawfulness of

the seizure to adjudication in a prize court; and that there is one excuse only, and that is a want of force on the part of the captors to man the prize. Very well, we have one case, then, in which it is not necessary to establish the right to seize, by the decision of a prize court. Now suppose that Captain Wilkes had seized the despatches, and, taking them and Messrs. Mason and Slidell on board of the San Jacinto, (as we suppose he had a right to do, for safety, if he had a right to seize the Trent,) had then put a prize crew on board of her, and that she had afterward foundered at sea, or been captured by a Confederate privateer. The proceedings in admiralty for confiscation are *in rem;* and the *thing* being gone, no evidence of the right to seize could be had through the adjudication of a prize court. This would not have discharged the persons, nor forfeited the right to withhold the despatches. Here, then, seems to be another case.

We readily admit that the officer making a seizure cannot confiscate the property. If a judgment of confiscation is sought, the property must be libelled. The vessel is sent in as prize, and because she is prize, and is to be disposed of as prize; and not because she is necessary as evidence. Evidence other than that found on board the vessel may be received. (6 Robinson, 351, Case of the Romeo.)

But we have seen by the opinion of Sir William Scott, that *despatches are not the subject of confiscation; and it is at least equally clear that Messrs. Mason and Slidell are not so. If the vessel had been sent in, there could not have been any proceeding in the prize court against them or the despatches, and of course no judgment against either.* It is true that, the violation of neutrality by the transportation of the persons and of the despatches being the alleged ground of the seizure and of the claim of forfeiture, the question whether the persons were to be regarded as hostile agents, whether the despatches were of a hostile character, and all other questions affecting the right to seize, would be directly before the court,

and would be determined there, *for the purposes of that case; that is, for the purpose of deciding whether the vessel was liable to confiscation or seizure, but no further. The judgment of the prize court would not operate upon the persons or papers.* While, upon the ordinary principles of law, in the absence of fraud or gross mistake, Great Britain would be bound to respect and abide by the decree of the court, so far as regarded the vessel, as the United States have done in relation to the decisions of Sir William Scott, there would be nothing in the judgment of the court to prevent that government from claiming of the United States the persons and papers, on evidence to be adduced in support of the claim, if it was believed that the opinion of the prize court was erroneous.

The distinction between evidence necessary to prove an issue, and the matter in issue, is familiar to every sound lawyer. A man is indicted for stealing the property of A. B., and in order to procure a conviction it must be proved, to the satisfaction of the jury, that the property alleged to have been stolen was the property of A. B., and this being done, the defendant is convicted. But this will not prevent C. D. from afterward sustaining a suit, to recover the property or its value, on evidence that it in fact belonged to him. It may be said that the reason is, that C. D. was not a party to the proceedings under the indictment, and so not bound by the proceeding there; but that in the prize court, where the proceedings are *in rem*, all persons interested in the property are regarded as parties, and bound by the decree. Admit it. But they are parties only as to the matter in issue, and not as to the evidence; and they are bound therefore only so far as the judgment goes, that is, by the confiscation of the vessel.

We claim, then, to have shown that the seizure, and even the confiscation, of the vessel would have determined nothing in relation to Messrs. Mason and Slidell, except for the purpose of the inquiry, Prize or not prize? that the judgment in the prize court would in no wise have operated upon them; and

that the opinion which that court entertained, so far from being conclusive on the British government in relation to their capture, would not, in a legal point of view, be even *prima facie* evidence. In a diplomatic correspondence between that government and the United States, it might, if it existed, be used as evidence; but other evidence would be equally admissible on either side. On the other hand, the judgment of the prize court releasing the vessel, based upon the expressed opinion of the judge that the persons were not liable to capture, and that the neutral vessel was in the regular exercise of her rights, while it may have furnished ground for an application to the government for their discharge, would not have been legal evidence of a right to their liberty.

We maintain, therefore, that all questions respecting the legality of the seizure of persons on board of neutral vessels, so far as they affect the persons themselves, or the relations of the government to which they belong and that making the seizure, are either legal questions for courts of common-law jurisdiction, or political questions to be settled by negotiation, if they can be settled in that mode.

If these positions are correct, the conclusion cannot be escaped that the capture of the vessel was not necessary, either as matter of substance or of form, in order to justify the capture of the persons. "*Lex neminem cogit ad vana seu inutilia.*" "*Utile per inutile non vitiatur.*"

But it may be asked, Has the captain of a belligerent cruiser a right to overhaul the merchant-vessel of a neutral nation, and take men out of her, on the plea that they are enemies, without any adjudication as to the right to make the capture? We answer, Certainly, if he can make proof of the right afterward. There can be no adjudication at the time. He does it on his responsibility and the responsibility of his government, if the right cannot be established. If he may seize vessel, crew, cargo, and passengers on this responsibility, and send them all into port, surely he may seize the hostile

passengers who give occasion for the capture. In fact, if Captain Wilkes had seized the vessel, it would have been his duty to take Messrs. Mason and Slidell on board his own vessel for security, and on his arrival to report, and deliver them into the custody of the government, which might at once have released them, and this without affecting the proceedings against the vessel.

Further, a party who has a right may waive that right; certainly, if others are not thereby prejudiced. The only parties interested in favor of the capture of the Trent were the United States and the officers and crew of the San Jacinto. Captain Wilkes, in behalf of the United States, and for himself, his officers, and crew, waived the right to make the capture; and the government has sanctioned that proceeding. Is Great Britain prejudiced?

The speeches at the banquet of the Lord Mayor of London certainly did not indicate a rupture of the friendly relations between the United States and Great Britain within a very short period; but it must be admitted that this furnishes no absolute assurance.

If Great Britain insists upon the delivery up of the prisoners, and the Cabinet at Washington surrender them *upon the ground that the demand is a distinct abandonment of the doctrines which she and her prize courts have heretofore so persistently maintained*, the people will acquiesce, and she may yet believe that she has gained nothing by the course thus pursued. If she demand an apology because *the United States have merely followed out those doctrines*, we venture the opinion that she will not get it.

APPENDIX.

Note A. Page 32.

The United States have for a long period, in treaties and otherwise, endeavored to procure the introduction of certain principles into the law of nations, different from those heretofore held by Great Britain, respecting the rights of neutrals, — among them, the principle that the neutral flag should cover the property of an enemy not contraband of war. The Congress at Paris in 1856 adopted this with other principles; and the United States having offered to become a party to that adoption, the principle may perhaps be recognized hereafter, although the accession of the United States to the declaration of the Congress at Paris has not been received.

Note B. Page 66.

The following extracts show that Dr. Phillimore recognizes the right of the belligerent to search and seize where the voyage is from one neutral port to another neutral port. He puts that as a case where there is less to excite the vigilance of the master of the neutral vessel, and one where some allowance should be made for any imposition practised on him.

"It is indeed competent to those intrusted with the care of the ship on board of which such despatches are found, to discharge themselves from the imputation of being concerned in the knowledge or management of the transaction. But the presumption is strong against the ignorance of the master of the ship; and when he has knowingly taken on board a packet or letter addressed to a public officer of a belligerent government, the plea of the insig-

nificance of the communication, and its want of connection with the political objects of the war, will not avail him; nor, except perhaps in an extreme case of imposition practised upon him, will the plea of ignorance of the *contents* of the despatches avail him: his redress must be sought against the person whose agent or carrier he was.

"With respect to such a case as might exempt the carrier of despatches from the usual penalty, it is to be observed that *where the commencement of the voyage is in a neutral country, and to terminate at a neutral port*, or at a port to which, though not neutral, an open trade is allowed, in such case there is less to excite the vigilance of the master; and therefore it may be proper to make some allowance for any imposition which may be practised on him. But where the neutral master receives papers on board in a hostile port, he receives them at his own hazard, and cannot be heard to avow his ignorance of a fact with which, by due inquiry, he might have made himself acquainted." — 3 *Phill. Int. Law*, 374 (published in 1857).

It may be admitted that in such case, if, without knowledge on the part of the master, and with nothing to excite suspicion, he, in the ordinary course of his business, carries contraband goods intended for a belligerent, or the officers, soldiers, agents, or despatches of a belligerent, this should not furnish cause for the confiscation of the vessel. But neither the fact that the immediate transit was from one neutral port to another, nor the want of knowledge of the master, furnishes a reason why the contraband goods intended for the belligerent, or the persons in his service, or his despatches, should have active transportation, for the purposes of the war, by the neutral vessel, and at the same time immunity from capture because of her neutrality. The vessel cannot be regarded as the *territory* of the neutral under such circumstances, for territory is not a vehicle of transportation.

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